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No. 42.

Petition for Rehearing.

1902

Supreme Court of the United States.

OCTOBER TERM, 1901.

THE [illegible]

THE [illegible] AND
THE [illegible] ROAD
COMPANY [illegible]

APPEAL [illegible] THE COURT OF [illegible]
AND THE [illegible] DISTRICT OF [illegible]

PETITION [illegible]

Supreme Court of the United States.

OCTOBER TERM, 1901.

No. 42.

STATE OF ARKANSAS, APPELLANT,

vs.

KANSAS AND TEXAS COAL COMPANY AND THE ST. LOUIS AND SAN FRANCISCO RAILROAD COMPANY, APPELLEES.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF ARKANSAS.

PETITION FOR REHEARING.

The Kansas and Texas Coal Company respectfully prays the court to set aside its judgment in this cause reversing and remanding the cause, and to grant a rehearing herein for the reasons following, to wit:

First.

Because there are many important questions involved in this case, and the decision of the court herein, it is re-

spectfully submitted, if permitted to stand, will and does overrule a number of cases heretofore decided which have long been considered the law of the court.

Second.

That the court, in preparing its opinion herein and in deciding this case, has overlooked important questions clearly decisive of the case, some of which were not presented by counsel and which are controlling, and any one of which is of itself sufficient to lead to different conclusions from those announced by this court with respect to the right of removal of this cause from the circuit court of Sebastian county, Arkansas, into the circuit court of the United States for the Ft. Smith division of the western district of Arkansas.

Third.

Because the court, it is respectfully submitted, erred in holding that there were no averments in the bill of complaint under which the State of Arkansas could have invoked the original jurisdiction of the circuit court of the United States under section 1 of the act of 1887–1888 for the reason that the bill of complaint upon its face shows that the issue is one between The State of Arkansas, as complainant, and citizens of another State, as defendants; and while it is true that The State of Arkansas, as the party complainant, is not a citizen within the meaning of the removal act, still, under the grant of judicial power in the second clause of article III of the Constitution, Federal courts are given jurisdiction in cases between a State and citizens of another State (and this grant of judicial power continues in-

tact except so far as limited by the provisions of the eleventh amendment), and section 1 of the act of 1887–1888 confers jurisdiction in such cases upon the circuit courts of the United States, and section 2 gives the right to remove such a case into the United States circuit court; so that upon the face of the bill of complaint this case was removable, for that The State of Arkansas was the party complainant and two citizens of another State were defendants, and the case therefore arose under the Constitution of the United States, within the meaning of section 1 of the act (1887–1888), and this by virtue of said grant of judicial power and within the limits thereof and founded thereon.

Fourth.

Because the court holds, in its opinion in this case, that the removability of a case from a State court into the circuit court of the United States is dependent upon whether the bill of complaint or declaration states a cause of action at law or in equity, when, as a matter of fact, this court has time and again held that removability does not depend upon the question whether plaintiff can recover upon and under the cause of action or statement of his claim set forth in his bill of complaint or declaration—in other words, that removability of the cause is one thing and the question whether plaintiff or complainant therein can recover is another and entirely distinct thing—that is to say, one is a question upon the merits of the cause and the other a question of removability; and it is respectfully submitted that the opinion, decision, and judgment of this court in so holding is directly contrary to at least four late decisions of this court, and par-

ticularly the following: St. Louis & San Francisco Railroad Co. *vs.* McBride, 141 U. S., 127; Marshall *vs.* Holmes, 147 U. S., 589; Schunk *vs.* Moline, etc., Co., 147 U. S., 500; Pacific Express Co. *vs.* McDowell, 140 U. S., 692.

Fifth.

It is respectfully submitted that the court erred in holding that the word "import" necessarily meant bringing men (of the class whose transportation over the St. Louis and San Francisco railroad the bill of complaint sought to prevent) into the town of Huntington and county of Sebastian and into the twelfth judicial circuit, but that the word "import" did not necessarily mean bringing men (of the class whose transportation over the St. Louis and San Francisco railroad the bill of complaint sought to prevent) into the State of Arkansas from points outside of the limits of that State, and the fundamental error in this behalf becomes at once apparent, it is respectfully submitted, when we attempt to give a *negative* answer to the following question: Would the defendants be guilty of contempt for violating an injunction issued under the bill of complaint by bringing in from points outside of the State of Arkansas the class of men whose transportation over the St. Louis and San Francisco railroad the bill sought to prevent?

It is impossible to answer this question in the negative, because it would be impossible to prepare an injunction order under the allegations of the bill of complaint in this cause (if kindly disposed in that behalf) which would permit the transportation of men (of the class whose transportation over the line of the St. Louis and San Francisco

railroad the bill sought to prevent) from points in the State of Arkansas to points within the twelfth judicial circuit of Arkansas, which injunction order would not at the same time prevent the transportation over said railroad of men (of the class whose transportation the bill sought to prevent) from points outside of the limits of the State of Arkansas and from such points into the twelfth judicial circuit of Arkansas, unless said injunction order *plainly prohibited* the transportation of such men over said railroad into the twelfth judicial circuit of Arkansas *from points outside of the State of Arkansas* and *expressly permitted* the transportation of such men over said railroad *from points in Arkansas* outside of said judicial circuit *into the limits of said judicial circuit* over the line of said railroad.

Such an injunction order would be in direct conflict with the plain purpose of the bill of complaint and would accomplish nothing but to prevent the transportation of such men over said railroad from points in Arkansas into said judicial circuit *and leave both defendants free to bring in such men over said railroad from points outside of the State of Arkansas.*

So drawn, and this is the only way, it is submitted, such an injunction order could be drawn, the State of Arkansas would thereby object to the transportation of such men from any part of that State into said judicial circuit, and at the same time show its willingness to have the same class of men transported from outside of that State into said judicial circuit (if the bill of complaint upon its face means no more than this court construes it to mean—in other words, if the bill of complaint upon its face seeks only and has no other purpose than to prevent the transportation of such men over said railroad from points in Arkansas to points in

that State within the limits of said judicial circuit); and in reaching these conclusions we draw simple, legal deductions from the allegations of the bill of complaint and need not inspect the injunction order (printed Record, p. 3) which was issued by the State court, at chambers, before the bill of complaint was filed, *which injunction order is no broader than the bill of complaint* and which does *prohibit the transportation* of such men over said railroad into said judicial circuit *from any place inside or outside of the State of Arkansas and for all time to come.*

Sixth.

If it can be said as matter of law that the State of Arkansas was not the real party in interest in this case, then diversity of citizenship appears upon the face of the bill of complaint, because the prosecuting attorney of the twelfth judicial circuit, together with the people of that circuit and the citizens of that portion of Arkansas (assuming the bill of complaint is limited in application to citizens of Arkansas), who desired to be transported over the line of the St. Louis and San Francisco railroad into the twelfth judicial circuit, and whose transportation the bill sought to prevent by injunction in this proceeding, would be the two classes of persons interested in this proceeding as complainants or parties plaintiff, and they are all citizens of Arkansas; on the other side would be two non-residents of the State of Arkansas and citizens of Missouri.

Seventh.

Because the legal effect of the injunction prayed for, even if it were limited in its operation, as suggested by the court in its opinion, to citizens of Arkansas, would still amount to an obstruction to and destruction of interstate commerce, for the reason that no person could be transported north or south of Ft. Smith nor north nor south of Jenson towards or to Huntington, in the county of Sebastian, without being carried out of the State of Arkansas and into the Indian Territory, and then again into the State of Arkansas and out into the Indian Territory again, traveling from the north; and if they came from the south they would have to be transported through the Indian Territory to Jenson, and in alighting from the train would alight in the Indian Territory, and then enter the State of Arkansas after they had crossed the station platform and entered the station-house at Jenson, and thence on to Huntington.

In short, the physical location of the main line of the St. Louis and San Francisco railroad is such that interstate commerce would necessarily (and not incidentally) be affected by granting the injunction prayed for.

The class of men whose transportation was sought to be prevented must have been located outside of the twelfth judicial circuit court, else the State of Arkansas would never seek to enjoin their transportation into the twelfth judicial circuit, and if so located such men could only come into the twelfth judicial circuit from a point north or south of Jenson, over the line of the St. Louis and San Francisco railroad, because there is no part of said railroad located in the county of Scott, and because the main line thereof runs south from

Van Buren, on the Arkansas river, through the city of Ft. Smith, to the town of Jenson, and from thence the Mansfield branch extends to the town of Huntington.

Eighth.

Because, it is respectfully submitted, this court ignores the fact that an injunction granted under the allegations of the bill of complaint would prevent the railroad company from transporting men (of the class whose transportation the bill sought to prevent) through the State of Arkansas from points north or south of Ft. Smith, *whether going to Huntington or not*, because the main line of said railroad runs from north east to southwest through Sebastian county (which is part of the twelfth judicial circuit); and this statement shows that a Federal question appeared upon the face of the bill of complaint, to wit: Can the State of Arkansas or any officer thereof or anybody else (except under authority of an act of Congress) obstruct or destroy commerce between the States?

Ninth.

Section 5, article II, of the Arkansas constitution declares that:

"the citizens of this State shall have the right to keep and bear arms for their common defense."

And the fourteenth amendment makes the citizens of each State citizens of the United States, and declares

"nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

Assuming that the State of Arkansas is the real party in interest, how can that State, in view of section 5 of article II of its constitution, and in view of the fourteenth amendment, deny *to certain of its citizens* (also citizens of the United States), assuming the bill of complaint is limited (as stated by this court) in its application and restrictions upon locomotion and traveling upon the line of the St. Louis and San Francisco railroad to citizens of Arkansas, the right to bear arms and the right to travel and contract and act as all other citizens of Arkansas may, freed from all such restraints and restrictions as the bill of complaint seeks to impose upon them?

And do not these Federal questions appear upon the face of the bill of complaint?

Tenth.

It is submitted that the question also arises upon the face of the bill of complaint, and does appear from plaintiff's statement of his own claim (assuming the State of Arkansas to be the real party in interest), whether the State of Arkansas, under the fourteenth amendment, has the right to select the Kansas and Texas Coal Company and the St. Louis and San Francisco Railroad Company from and out of all of the non-resident railroad and coal mining companies doing business in the State and the same part thereof and by a proceeding in equity prevent them by injunction from doing the two things sought to be prevented when all of the other non-resident coal companies are not so prevented, and when all other State or interstate railroad companies and common carriers are not affected or sought to

be affected or prevented from doing the same identical thing.

In other words, the State of Arkansas, being the real party in interest in this proceeding, seeks to prevent the Kansas and Texas Coal Company, a non-resident business corporation, from doing a certain thing which every other business corporation, resident or non-resident, would have the right to do, there being no law which prevents the doing of any such thing.

And every resident or non-resident railroad company doing business as a common carrier and transacting an interstate business as a common carrier would have the right to do the thing which the St. Louis and San Francisco railroad alone would be prevented from doing, solely because of the injunction sought in this proceeding, in the absence of any law which would prohibit any other resident or non-resident railroad company as a common carrier from so doing.

Eleventh.

And it is respectfully submitted that it does appear from plaintiff's statement of its own claim (assuming the State of Arkansas is the real party in interest) that a question arises under the Constitution of the United States, from the allegations of the bill itself, in this, that the question arises whether the State of Arkansas under the fourteenth amendment (which denies to any State the right to deprive "any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws") can secure an injunction against two citizens of another State (in the absence of any State

law declaring its public policy) to prevent the doing of the acts alleged to be threatened, and which the bill of complaint seeks to prevent, when the relief granted would place a burden upon interstate commerce, and would deprive resident and non-resident citizens of their rights, privileges, and immunities under said amendment, and place upon them burdens which are not borne by others under similar circumstances and conditions, and thereby deprive them "of the equal protection of the laws."

Twelfth.

It is submitted that it is important to determine whether the decision announced in this case is in conflict with the decision announced (at this term, on October 23) in Hickman *et al.*, railroad commissioners of Missouri, *vs.* Missouri, Kansas and Texas Railway Company, by Mr. Justice Brewer—that is to say, is the State of Arkansas the real party in interest?

And it is or it is not.

If not the real party in interest, then the people of the twelfth judicial circuit of Arkansas and their prosecuting attorney and the people of Arkansas outside of said judicial circuit living along the line of the St. Louis and San Francisco railroad who desired to be transported over said railroad into said judicial circuit (assuming the bill of complaint upon its face to be limited in its application to citizens of Arkansas, as held by this court), and whose transportation over said railroad the bill of complaint sought to prevent, *would be the real parties in interest as complainants*, and citizens of Arkansas and two citizens of Missouri are de-

fendants; hence diversity of citizenship upon the face of the bill of complaint.

Thirteenth.

Because several Federal questions appear in complainant's statement of its own claim and upon the face of the bill—that is to say, the construction of the interstate commerce clause of the Constitution and the provisions of the fourteenth amendment, unless the court is prepared to hold that all the facts of geography and matters of common knowledge in the western district of Arkansas—open, notorious, and indisputable—and all the boundary lines and subdivisions of said district—in short, all facts of which judicial notice will be taken—are not as much a part of the bill as if set out at length therein, both at common law and by virtue of the statute of Arkansas which declares that "neither presumptions of law nor matters of which judicial notice will be taken need be set forth in any pleading;" and to hold further, that complainant must also allege that his case does arise under the Constitution of the United States notwithstanding the facts alleged show that it does.

Wherefore it is respectfully submitted that this petition for rehearing should be granted and this cause set down for oral argument.

ADIEL SHERWOOD,
With JOSEPH M. HILL AND
JAMES BRIZZOLARA,
Attorneys for Kansas and Texas Coal Company.

CERTIFICATE OF COUNSEL.

I hereby certify that I am solicitor and of counsel for the Kansas and Texas Coal Company in this cause, and that in my opinion the foregoing petition for rehearing of said company is well founded in point of law and proper to be filed in this cause.

ADIEL SHERWOOD,
Solicitor and of Counsel for Kansas and Texas Coal Company.

STATEMENT.

The eastern boundary of the Indian Territory from the southwest corner of Missouri (and the western boundary of Arkansas) is in the shape of a long bow with an outward middle curve towards the east, and that curve towards the east reaches its greatest fullness along the western line of Crawford and Sebastian counties, so that all of the country west of a straight line extended south from the southwest corner of Missouri to the point on the Red river at the southeast corner of the Indian Territory is located in the Indian Territory, and said line runs south, east of the east bank of the Arkansas river, and forms the western boundary line of the city of Ft. Smith and of Sebastian county and of the State of Arkansas.

As a matter of fact, it would be a physical impossibility for the St. Louis and San Francisco railroad to transport men of the class whose transportation the bill sought to prevent from any point along its line in Arkansas to any point

within the limits of the twelfth judicial circuit without transporting them out of the State of Arkansas into the Indian Territory back again into Arkansas and then again into the Indian Territory, because the main line of the St. Louis and San Francisco railroad runs near the eastern line of the Choctaw Nation, Indian Territory, south from Ft. Smith, and enters the Indian Territory at a point just southwest of Ft. Smith, and continues in the Indian Territory several miles, and then, with a sharp turn, said main line of road runs southeast, re-entering the State of Arkansas about thirteen miles south of Ft. Smith, and continues south a short distance in Arkansas and then turns sharply to the southwest, north of the town of Jenson, and runs southwardly into the Indian Territory towards Red river and Texas, so that, as a matter of fact, the main line of said railroad at Jenson is located in the Indian Territory, and the station platform at said station is likewise located in the Indian Territory, and the station-house at said station, which is located about north and south, is located directly on the western line of the State of Arkansas.

No one could be transported over the St. Louis and San Francisco railroad from the north through the city of Ft. Smith to Jenson and from thence to the town of Huntington, in Sebastian county, without becoming an interstate passenger, and, as a matter of fact, would enter the Indian Territory twice before the transportation could be completed, the town of Huntington being located upon a branch of the St. Louis and San Francisco railroad which runs from the town of Jenson, through the town of Huntington, into the town of Mansfield, which is in the south-central

part of Sebastian county, near the Scott County line, and the terminus of the Mansfield branch of said railroad.

There is one station upon the line of the St. Louis and San Francisco railway in the Indian Territory, south of Ft. Smith, called Cedars, located on that portion of the main line of said railroad after it leaves the State of Arkansas and before it again enters said State.

The twelfth judicial circuit was composed of the counties of Sebastian and Scott, both of which are oblong in shape, running north and south, and the western line of both of said counties is the western line of the State of Arkansas, and said two counties for that portion of the State of Arkansas form the eastern boundary of that portion of the Choctaw Nation, Indian Territory. The southern boundary line of Sebastian county is the northern boundary line of Scott county. The northern boundary of Sebastian county is the Arkansas river, and north of the river is Crawford county, and then Washington county, and next Benton county, the northern line of which is the southern boundary of the State of Missouri.

The St. Louis and San Francisco railroad is a great public highway running southwestwardly from the city of St. Louis, through the State of Missouri, to the town of Monett, from which point two lines diverge, one leading towards Kansas, and the other, running southwardly towards Arkansas, enters that State at a point just south of the town of Seligman and just east of the 94th parallel of west longitude. After entering the State of Arkansas the line runs first into Benton county and south through Rogers, the principal town of that county, and next into Washington county and south through Fayetteville,

the principal town of that county, and then south into Crawford county and into Van Buren, the principal town of that county, and here the line crosses the Arkansas river over a great railroad bridge authorized by act of Congress; thence southwardly into Sebastian county and into the city of Ft. Smith and southwardly from thence, as heretofore explained.

The St. Louis and San Francisco railroad from St. Louis to southwest Missouri and into Monett was the immediate successor of the Southwest branch of the Pacific railroad and of the Atlantic and Pacific railroad (acts of Congress, June —, 1866, 1st session, 39th Congress), and said railroad south of Ft. Smith into and through the Indian Territory was constructed under authority of acts of Congress, which required profile maps to be made and filed in the office of the Secretary of the Interior after his approval was endorsed thereon, and said maps were made, approved, and filed, and they show the location of every mile of road in accordance with the surveys and lines made under various acts of Congress (vol. 22, U. S. Statutes at Large, p. 181).

Sections 6170 and 6174 of Sandel and Hill's Digest of Arkansas require railroad companies to file profile maps of their location within each county. The St. Louis and San Francisco railroad, complying with this law, filed its profile maps with the recorder of deeds at Greenwood, Sebastian county.

All of these statements with respect to boundary lines, juxtaposition of boundary lines, etc., are verified by every map of the United States, of Arkansas, of Missouri, and of the Indian Territory, whether prepared by the Secretary of the Interior or not, and by the Government surveys made

by authority of law, by treaties with the Indian tribes, by the laws of Arkansas, by acts of Congress, by common knowledge, by open, notorious, and undisputed existence in the western district of Arkansas, and by the fact that every statement is of a matter of public, as distinguished from private, concern, and particularly by reference to maps 31, 44, and 48 of the Century Atlas, and the laws, treaties, etc., to which the attention of the court will now be called.

THE BOUNDARIES OF THE STATE OF ARKANSAS.

The boundary lines of Arkansas were defined upon its creation as a Territory (United States Statutes at Large, vol. III, act approved March 21, 1819).

The boundaries of Arkansas are also referred to in the act of Congress of June 15, 1836, admitting the State into the Union.

On May 26, 1824, Congress passed an act to fix the western boundary of Arkansas, and on June 23, 1836, a supplemental act with respect to the admission of the State.

The permanent boundary lines of the State of Arkansas are stated in article 1 of the constitution of 1874 of that State, and reference is made to the acts of Congress and the treaties with the Indian tribes existing January 1, 1837.

The retracing of the boundary line between Arkansas and Indian Territory was authorized by act of Congress of March 3, 1875 (19 Statutes at Large, p. 356), and this survey so authorized was made by Reddick McKee, and cost $11,880. (See The Public Domain, p. 179.)

TREATIES FIXING THE BOUNDARY LINE BETWEEN ARKANSAS AND INDIAN TERRITORY.

In the treaty proclaimed May 28, 1826, between the Cherokee Nation and the United States (Revision of Indian Treaties, p. 57) it is provided in section 3 that the United States is to have a survey made, and in article 1 of said treaty the western boundary of Arkansas was defined as follows, to wit:

"A line shall be run commencing on Red river, at the point where the eastern Choctaw line strikes said river, and run due north with said line to the river Arkansas, thence in a direct line to the southwest corner of Missouri."

In the treaty proclaimed April 12, 1834, between the United States and the Cherokee Nation (Revision of Indian Treaties, p. 61), it is provided in article 1 that the boundary between Arkansas and the Indian Territory shall be drawn as therein described, and this description speaks of the point "on the Arkansas where the Choctaw boundary strikes said river;" and this boundary is again referred to in the treaty between the United States and the Cherokee Nation proclaimed December 31, 1835 (Revision of Indian Treaties, p. 65), and the location of the eastern Choctaw boundary is referred to in article 2 of said treaty as the treaty of April 12, 1834.

In the treaty proclaimed June 2, 1855, between the United States and the Choctaws and the Chickasaws (Revision of Indian Treaties, p. 274) the permanent boundary line between the State of Arkansas and the Choctaw and Chickasaw Nations is provided in article 1, and this boundary line running north

and south begins at a point one hundred (100) paces east of old Ft. Smith, where the western boundary line of Arkansas crosses the Arkansas river, and thence due south to Red river, and article 19 of this same treaty binds the United States, as soon as practicable, to cause the eastern and western boundary lines, described in article 1 of that treaty, to be run and permanently marked. The initial point in the survey provided for, and also in the Reddick McKee survey, authorized by a later act of Congress (19 Statutes at Large, p. 356), was and is located at the corner of the vacant quartermaster's store upon the United States reservation at Ft. Smith, and about two-thirds of the stone marking this permanent boundary is in the Choctaw Nation and the remainder is in the State of Arkansas.

It will be remembered that Ft. Smith was first located as a United States military post and reservation, and the limits of old Ft. Smith referred to in the treaty above mentioned are the limits of the old military reservation.

The national cemetery at Ft. Smith is located in Sebastian county, all except the southern fifteen feet, which is in the Indian Territory, and the St. Louis and San Francisco railroad runs into the Indian Territory at a point southwest of Ft. Smith and not much more than one hundred yards from the south wall of the national cemetery.

Article 1 of the treaty of June 2, 1855, sometimes called the treaty of Washington, defining the boundary line, is the following:

"Beginning at a point on the Arkansas river one hundred paces east of old Ft. Smith, where the western boundary line of the State of Arkansas crosses said river, and running thence due south to Red river; thence up Red river to

the point where the meridian of 100° west longitude crosses the same; thence north along said meridian to the Canadian river; thence down said river to its junction with the Arkansas river; thence down said river to the place of beginning."

And under the provisions of article 6 of the treaty of July 10, 1866 (Revision of Indian Treaties, page 285; l. c., 288), it is provided that Congress may grant a right of way to railroad companies through the Indian Territory, and the same provision is made in article 18; and article 19 of the treaty of Washington (l. c., 280) provides that the United States shall, as soon as practicable, cause the eastern and western boundary lines of the Territory to be run and permanently marked.

The boundary line between Arkansas and the Indian Territory was resurveyed and the boundaries fixed afterwards, under the provisions of the act of Congress of 1875, chapter 140 (see 18 Statutes at Large, p. 476; also p. 357, 19 Statutes at Large), commencing at the same initial point.

The St. Louis and San Francisco railroad was constructed south of Ft. Smith, through the Choctaw Nation, under authority conferred by act of Congress and in accordance with the provisions of article 6 of the treaty proclaimed July 10, 1866, between the United States and the Choctaw and Chickasaw Indians (Revision of Indian Treaties, p. 285).

The surveys required by acts of Congress in Arkansas and the Indian Territory were made and the boundaries marked as required by the laws of Arkansas and said acts and in accordance with the statute with respect to the sur-

veys of public lands (sections 2395, etc., chapter 9, Revised Statutes of the United States, 2d ed., 1878, p. 438).

In chapter 333, section 6, page 671, vol. I, 2d ed., 1874–1891, Suppl. to the Revised Statutes of the United States (25 Stat. L., 783), it is provided:

"That all that part of the United States which is bounded on the north by the State of Kansas, on the east by the States of Arkansas and Missouri, on the south by the State of Texas, and on the west and north by the Territory of Oklahoma, as defined in the first section of this act, shall be known as the Indian Territory."

BOUNDARY LINES OF SEBASTIAN COUNTY AND CITY OF FT. SMITH.

The boundary lines of Sebastian county were fixed and determined by an act of the legislature approved January 6, 1851 (Acts of Arkansas, 1851, p. 81).

Under the provisions of an act of Arkansas (Laws 1842, p. 147), which is the first public act with respect to the incorporation of the city of Ft. Smith (formerly in Crawford county), certain trustees were appointed to fix the metes and bounds of the town and have the same surveyed and platted. Said plats were to be recorded in the office of the recorder of deeds of the county, and all this was done.

The Arkansas river is the northwest boundary in part of the city of Ft. Smith, and owing to a sharp turn in the river and the curve of the eastern Choctaw boundary line "at the point on the Arkansas where the Choctaw boundary strikes said river," the eastern Choctaw boundary line is some distance from the east bank of the Arkansas, and this eastern Choctaw line is the western line and boundary *at*

the same time of the State of Arkansas, the twelfth judicial circuit, the county of Sebastian, and of the city limits of Ft. Smith.

BOUNDARIES OF TWELFTH JUDICIAL CIRCUIT.

These were fixed by an act of Arkansas approved March 8, 1889 (Laws, 1889, p. —).

The old military reservation at Ft. Smith is referred to in an act of Congress approved March 16, 1886, which is chapter 20 of the United States Statutes at Large, volume 24, page 4, 1885–1887, and said act provides that a jail shall be built on the site of the old Federal building, and in the same act an appropriation is made for a new Federal building wherein the United States courts are held at Ft. Smith.

The western district of Arkansas was organized by an act of Congress dated January 31, 1877, which was amended by a later act of Congress, dated February 6, 1889.

Congress has repeatedly recognized the juxtaposition of the city of Ft. Smith and the Indian Territory, and particularly in this way. In an act approved February 26, 1889, chapter 280, 25 United States Statutes at Large, page 745, Congress granted a right of way to the Ft. Smith, Paris and Dardanelle railway, "beginning at the said city of Fort Smith; thence running to the Arkansas river either in the State of Arkansas or the Indian Territory, and crossing said river either in the said State or Territory, and thence through said Territory or through said State and Territory," etc.

In an act approved June 18, 1888, volume 25, United

States Statutes at Large, page 184, Congress authorized the Ft. Smith Bridge Company to construct a bridge across Poteau river, "at or near Fort Smith."

In an act approved May 30, 1888, volume 25, United States Statutes at Large, page 162, Congress granted a right of way through the Indian Territory to the Ft. Smith and El Paso railway, "to begin at a point at or near the city of Fort Smith on the western boundary of Arkansas."

In an act approved August 2, 1882, volume 22, United States Statutes at Large, page 181, Congress granted a right of way through the Choctaw and Chickasaw Nations, from which the following quotations are made:

SECTION ONE. "Said right of way to commence at any point to be selected by said company on the line of the Choctaw Nation, immediately contiguous to Sebastian or Scott counties in the State of Arkansas, and run thence in a southwesterly direction on the most direct and practicable route through the lands of the said Choctaw and Chickasaw Nations in the direction of Paris in the State of Texas."

Section 7 of said act requires the railroad company to bill freight "from points on its line in the Indian Territory to Chicago, with the privilege of stop-over at St. Louis the same as if billed to St. Louis in the first instance."

Section 5 of this act requires the "grant to be accepted within ninety days after the passage thereof and within thirty days after that time the railroad company is required to fix and determine the general route of its line of road through the Indian Territory by filing with the Secretary of the Interior a map of preliminary survey and definite location within one year next thereafter," and in section 10

of the act it is provided that the grant will become void if said map be not filed.

Section 3 of this act gives jurisdiction to the United States circuit court for the western district of Arkansas in all suits of any kind or character brought by the members of the Indian tribes against the railroad company on account of the failure to settle right of way disputes.

And section 5 of the act provides that said line of railroad shall be completed within one year after the passage of the same.

Congress by an act approved February 17, 1883, volume 22, United States Statutes at Large, page 419, chapter 47, entitled "An act granting a right of way for railroad purposes and telegraph lines through the lands of the United States included in the Fort Smith military reservation at Fort Smith, in the State of Arkansas," gave said railroad company the right to locate its main line through said reservation, "beginning at the initial point on the boundary line between the State of Arkansas and the Choctaw Nation."

It is further provided that the piece of ground given the railroad company for right of way in said act shall commence at the southern boundary of section 17, township 8 north and range 32 west of the fifth principal meridian, and 588 feet west of the rock on said southern boundary of section 17 which marks the southeast corner of said United States reservation.

And said act also speaks of "a point on the northern boundary of ground reserved for a national cemetery, 96 & $\frac{3}{10}$ feet distant from the intersection of said northern

boundary with the boundary line between the State of Arkansas and the Choctaw Nation."

In other words, the right of way granted to the St. Louis and San Francisco Railway Company runs north and south through said United States military reservations and in a portion of the Choctaw Nation, Indian Territory.

It is further provided in said act that said right of way of the railway shall cross Garrison avenue (which is the principal street east and west in Ft. Smith) near the southwestern boundary thereof, where said avenue intersects the northeastern boundary of the reservation.

It is further provided in said act that new stone walls shall be built by the railroad company for the old fort, and "provided that from where the right of way of said railway company enters and extends through the walls, enclosing the old fort, said railway company shall erect and build a stone wall on the extreme line of the inside boundary of their right of way of like height and dimensions as the wall now enclosing the fort, so that the fort after the construction of the road shall be completely enclosed."

By an act approved July 3, 1882, chapter 266, volume 22, United States Statutes at Large, page 144, Congress passed an act entitled "An act to authorize the construction of a bridge over the Arkansas river at the town of Van Buren, Crawford county, Arkansas," and this right of way granted to the St. Louis and San Francisco railway, and in section 2 it is provided that said bridge shall be a lawful structure and post-route for mail, etc., and in section 5 it is provided that plans, details, etc., must be submitted to the Secretary of War. The Reddick McKee survey was made under the provisions of chapter 140, volume 18, United States Statutes

at Large, page 476, which act was approved March 3, 1875, and entitled "An act to establish the boundary line between the State of Arkansas and the Indian country."

It is provided in section 1 of this act that "the boundary line between the State of Arkansas and the Indian country, as originally surveyed and marked and upon which the lines of the survey of the public lands in the State of Arkansas were closed, be, and the same is hereby, declared to be the permanent boundary line between the said State of Arkansas and the Indian country," and in section 2 that "the Secretary of Interior shall, as soon as practicable, cause the boundary line, as fixed in the foregoing section to be retraced and marked in a distinct and permanent manner," etc.

By the act of June 1, 1886, volume 24, United States Statutes at Large, page 76, Congress extended the time for completion of the St. Louis and San Francisco railway through the Indian Territory for two years next thereafter.

Congress appropriated the money for making the survey last referred to by an act passed in 1887, which will be found in volume 19, United States Statutes at Large, page 356, and the same statement will be found set forth in "The Public Domain," page 179.

BILL OF COMPLAINT.

IN THE CIRCUIT COURT OF SEBASTIAN COUNTY FOR THE GREENWOOD DISTRICT.

THE STATE OF ARKANSAS, *Plaintiff*,
vs.
KANSAS AND TEXAS COAL COMPANY and SAINT LOUIS AND SAN FRANCISCO RAILROAD COMPANY, *Defendants*.

Complaint in Equity.

1. The plaintiff, The State of Arkansas, on the relation of Jo. Johnson, prosecuting attorney for the 12th judicial circuit, for her cause of action alleges:

2. That defendant Saint Louis and San Francisco Railroad Company is a corporation organized under the laws of the State of Missouri, owning and operating a railroad in the 12th judicial circuit of Arkansas, and more particularly in Sebastian county, of said circuit.

3. That defendant Kansas and Texas Coal Company is a corporation duly organized under the laws of the State of Missouri, owning and operating a coal mine at Huntington, in the Greenwood district of Sebastian county.

4. That a high state of excitement and condition of hot blood now prevails between striking miners and their sympathizers, in large numbers, on the one side, and said coal company and its employés, on the other.

5. That said coal company is threatening and is about to import into said county and town of Huntington, over the line of their codefendant's railroad, a large number of armed men of the low and lawless type of humanity, to wit, about two hundred, to the great danger of the public peace, morals, and good health of said county, and more particularly of said town.

6. That said threatened action on the part of said defendant, if permitted to be executed, would become a great public nuisance and would destroy the peace, morals, and good health of said county and town; would lead to riot, bloodshed, and to dissemination of contagious and infectious diseases.

7. That said county and town of Huntington are now enjoying peace, health, and good order, and your relator believes that the loss of human life and untold expense to the tax-payers of said county on account of probable violation of the criminal laws can and should be prevented by the power of the law.

8. Wherefore your relator prays:

1st. That the defendant Kansas and Texas Coal Company, its agents, servants, and employés, and each of them, be restrained and prohibited from importing or causing to be imported or brought into Sebastian county or the twelfth judicial circuit of Arkansas, and that the St. Louis and San Francisco Railroad Company, its agents, servants, and employés, each, both, and all of them, be enjoined, re-

strained, and prohibited from importing, hauling, or bringing, or causing to be imported, hauled, or brought, in the said county or circuit, and from unloading or attempting to unload from any of its cars in said county or circuit any and all large bodies of armed, lawless, or riotous persons or persons affected with contagious or infectious diseases that might endanger the peace, good order, or good health of the State or create a public nuisance in said county or circuit, under the pains and penalty of the law;

2d. That a temporary restraining order be issued; and that,

3d. Upon final hearing said restraining order be made perpetual, and that the State have and recover her costs.

Jo. Johnson,
Prosecuting Attorney.

ARGUMENT.

It is respectfully submitted that certain propositions must be conceded without discussion :

1st.

That the legislative department must " determine primarily what measures are appropriate and needful for the protection of the public morals, the public health, or the public safety."

Prentice on Police Power, p. 31.

Mugler *vs.* Kansas, 123 U. S., 661 ; l. c., 666.

2d.

That the judicial department can exercise no police power, and can act only in passing upon the validity of the legislature's exercise of that power, and cannot create that power.

People *vs.* Gillson, 109 N. Y., 389.

3d.

That State " regulations of subjects of police power must not themselves be the regulation of commerce."

Gibbons *vs.* Ogden, 9 Wheat., 1.

Hannibal & St. Joseph R. R. Co. *vs.* Husen, 95 U. S., 469; l. c., 470, 471.

Hall *vs.* De Cuir, 95 U. S., 485; l. c., 488, 490.

Bowman *vs.* R. R. Co., 125 U. S., 465.

Chy Lung *vs.* Freeman *et al.*, 92 U. S., 275.

And traffic is interstate commerce when it is carried out of one State and through a portion of another State or Territory and back into the first State again.

State *vs.* R. R. Co., 40 Minn., 267.

New Orleans Cotton Exchange *vs.* N. O. & T. R'y Co., 2 Int. Com. Rep., 519.

Lord *vs.* Steamship Co., 102 U. S., 541.

Commerce Clause Federal Constitution (Prentice & Eagan), 88, 89, 90.

In Lord *vs.* Steamship Co., 12 Otto, 541, it is said:

"Never since the decision in the case of Gibbons *vs.* Ogden, 19 Wheat., 1, has there been any doubt about the proposition that a State can have no control over commerce between that State and other nations or States or the Indian tribes;" and, further, that "the contracts sued on in the present case were in effect to carry goods from San Francisco to San Diego via Pacific Ocean. They could not be performed except by going, not only out of the State of California, but out of the United States as well."

It is respectfully submitted the removability of this cause into the circuit court can be determined upon the face of the bill in either of two ways, or, third, can be determined under the allegations of the bill in connection with or without facts of which judicial notice may be taken (and which as a matter of law are just as much a part of the bill as if alleged therein), that is to say:

First.

If the State of Arkansas be the real party in interest, we have a State as complainant and two non-resident citizens as defendants, and thus a case arising under the Constitution of the United States founded thereon and authorized thereby (2d clause, article III), and one in which the jurisdiction of the circuit court could have been invoked under the first section of the act of 1887, 1888.

Texas & Pacific Railway Co. *vs.* Cox, 145 U. S., 593.

Second.

If the State of Arkansas be not the real party in interest, then we have as party plaintiff the people of the twelfth judicial circuit, represented by their prosecuting attorney, and as defendants two non-resident citizens, and thus upon the face of the bill diversity of citizenship.

Third.

The allegations of the bill show an attempt to enjoin the transportation of certain men into the twelfth judicial circuit over the St. Louis and San Francisco railroad with or without facts, of which judicial notice may, it is submitted, be properly taken, added thereto, show an attempt to obstruct and destroy interstate commerce (and it is immaterial whether this is attempted by the State of Arkansas or a portion of the people thereof), and an attempt also to encroach upon rights guaranteed by the fourteenth amendment (if the State of Arkansas be the real party in interest).

Wherefore it should be determined, 1st, whether the

State is the real party in interest; and, 2d, the proper limitations of the doctrine of judicial notice; and, 3d, whether with or without the application of that doctrine an obstruction of destruction of interstate commerce is shown by the allegations of the bill, and also, if the State of Arkansas be the real party in interest, whether the allegations of the bill show an attempted denial of rights guaranteed by the fourteenth amendment.

First.

Is the State of Arkansas the real party in interest?

The State of Arkansas sued in this behalf at the relation of the prosecuting attorney on the twelfth judicial circuit, and the two defendants are non-residents of Aakansas and citizens of Missouri, and therefore we have a case wherein the State on one side is complainant and two non-resident citizens are defendants. In other words, we have a case arising under the Constitution and laws of the United States authorized thereby and founded thereon, to wit, upon the second clause of article III (the grant of judicial power) of the Constitution of the United States.

It may be said that the State of Arkansas is not the real party in interest in this case, and that under the rulings of this court in Hickman *et al. vs.* McK. & T. R'y Co. (decided at the present term on October 23), that the State of Arkansas was not the real party in interest and did not prosecute or defend any right as an artificial person, and had simply a governmental interest in the litigation.

If this position be true and as a matter of law be correct, then we have a diversity of citizenship shown upon the face

of the bill—that is to say, we have citizens of the twelfth judicial circuit of Arkansas on the one side and two non-residents of Arkansas, to wit, citizens of Missouri, on the other side.

If the State of Arkansas has merely a governmental interest in this proceeding, and if, as stated in the *Reagan case* and in the *Hickman case*, "its results will not inure to the benefit of the State as a State in any degree," then the State of Arkansas is not the real party in interest.

It will be remembered that the rule is clearly and squarely announced in the case of Missouri, Kansas & Texas *vs.* Hickman *et al.*, by Mr. Justice Brewer, in the following words:

"But applying the same principles of construction to the removal of the case and to cases in which it is claimed that the State, though not the nominal, is in fact the real, party plaintiff, it may be fairly held that the State is the real party when the relief sought is that which inures to it alone, and in its favor the judgment or decree, if for the plaintiff, will effectively operate."

It is indisputable that the State of Arkansas is the real party in interest or it is not.

If the State of Arkansas be the real party in interest in this proceeding—in other words, if the relief sought is that which inures to the State of Arkansas alone, and in its favor the judgment or decree, if for said State, will effectively operate—then the State of Arkansas is the real party in interest under the rulings of this court; otherwise it is not.

If not the real party in interest, and if the State of Arkansas in this proceeding had simply a governmental interest—that is to say, an interest in the welfare of all of its

citizens—and the prosecuting attorney of the twelfth judicial circuit had the right to represent them by filing a petition in equity to enjoin the doing of certain things in the absence of any law forbidding those certain things to be done, then there is clearly a diversity of citizenship shown upon the face of the bill of complaint, because citizens of the twelfth judicial circuit are, as a matter of law, complainants, and two non-residents are defendants.

It will hardly be denied that the courts of Arkansas have no power, in the absence of legislation, to prevent the entrance of any person into the limits of Arkansas, and the police power cannot be exercised except in pursuance of legislation. In other words, there must be some law or ordinance of the State which prescribes certain rules and regulations before the courts are at liberty to act.

This being true, and the court taking judicial notice of the fact that the State of Arkansas had not passed any law authorizing the filing of such a bill of complaint, the question does arise upon the face of the bill of complaint whether complainant had the right to maintain such a proceeding when it would interfere with and was an attempted regulation of interstate commerce, because the proposition is announced clearly in Gibbons *vs.* Ogden that, "within the meaning of the commerce clause of the Federal Constitution, State regulations must be limited to the subjects of the police control *and must not themselves be the regulation of commerce.*"

In other words, if the State of Arkansas had enacted a law which forbade the doing of the things sought to be accomplished by this bill of complaint, the question would at once have been presented whether such a law was valid under

the Constitution of the United States, and certainly if this proposition be sound, then the question arises under the Constitution of the United States whether a proceeding of this kind, which seeks to accomplish an obstruction of interstate commerce, does not present a Federal question, whether the State appears by itself to enforce any supposed right under the police power or right of quarantine, or whether it appears by some prosecuting attorney or other agency asserting the right in the name of the State to exercise such a power.

In this view, in other words, the proceeding before the court is an attempt, pure and simple, through and by a prosecuting officer of the twelfth judicial circuit, composed of the counties of Sebastian and Scott, to enforce in equity by injunction some supposed right under the police power which belongs exclusively to the legislative department and in the absence of any statute declaring public policy or a public nuisance in that behalf, and this court in this case declares that the State of Arkansas is not asserting any right under the Constitution or laws of the United States and put toward no ground of relief derived from either—that is to say, that the State as a State was not prosecuting or defending any right as an artificial person—*i. e.*, as a State—and the ordinary deduction from this statement must be this, that the prosecuting attorney, in endeavoring to enforce some supposed right under the police power in a court of equity (independent of any legislation upon the subject in the territory over which it exercises jurisdiction), and that such a court could under the police power enforce rights as prayed for which would inure to the benefit of only a portion of the people of the State, to wit, those living within the limits of the twelfth judicial circuit.

Further assuming the allegations of the bill of complaint to be true, certainly upon the face of the bill the question arises whether the State of Arkansas or a portion of the people of said State had the right to do a thing which its prosecuting attorney for one of its judicial circuits alleges it has the right to do, and whether a proceeding to prevent the doing of all these things by these two defendants, if prevented, will not deprive them of rights, privileges, and immunities under the Constitution of the United States.

And certainly under the allegations of the bill and under the Constitution and laws of the United States the question (assuming that the State is the real party in interest) arises whether the State as such is prosecuting or defending a right as an artificial person in this proceeding; and, if so, whether the State has the right to obstruct and impede a common carrier in the performance of its public duty in carrying interstate traffic and obstruct and impede the transaction of its public business when that carrier is operating one of the great public highways of the country and transacting both State and interstate business; and the question also arises whether under the provisions of the fourteenth amendment the State as such had the right to prevent citizens of Arkansas, assuming that the bill could be properly limited in its operations to citizens of Arkansas, from traveling and the railroad company from transporting them through the State of Arkansas (and through the twelfth judicial circuit) and points north and south thereof—that is to say, into and out of the Indian Territory and into and out of the State of Missouri.

Second.

Judicial notice—the doctrine of, exemplified by the authorities—and its proper limitations:

As applied to pleadings:

The common-rule law of pleading was that facts need not be stated of which the court will take judicial notice.

Coke on Litt., 303 B.

And this rule is enlarged in Arkansas by section 5062, Mansfield's Digest, 1884 (section 5071, Sandel & Hill Digest, 1894), which provides that—

"Neither presumptions of law nor matters of which judicial notice is taken need be stated in any pleading."

And the same provision is made with respect to indictments in section 2118, Mansfield's Digest.

The rule is stated this way in Bliss on Code Pleading (3d ed.), section 137:

"The things of which the court will take judicial notice are, first, public laws, *or matters evidenced by public law which all are presumed to know;* second: *matters of such notoriety* including the commonly recognized facts of science as are supposed to be generally known; third: matters of mixed law and notoriety; and, fourth: *matters peculiarly within the knowledge of the particular court.*"

In short, everything of which judicial notice is taken is as much a part of the pleading and of the facts before the court "as if it had been set up and proof were plenary."

Brown *et al. vs.* Piper, 1 Otto (91 U. S.), 200; l. c., 201.

No proof is necessary in support of a motion where the facts are judicially known by the judge before whom the motion is pending.

Secrist *vs.* Petty, 109 Ill., 188.

It is not necessary that matters of which the court should take judicial notice be alleged in a pleading, and upon demurrer the pleading is to be read as if such matters were stated therein at length.

Walsh *vs.* Trustees of New York and Brooklyn Bridge, 96 N. Y., 477.

State *ex rel.* Campbell *vs.* St. Louis Ct. of App., 97 Mo., 276.

In the Walsh case, *supra*, it is held that public statutes should be read as if embodied in the complaint, and in the Campbell case, *supra*, it is held that a pleading need not set out the sections of the Constitution nor refer to them by numbers in order to raise a constitutional question.

As applied to both matters of pleading and evidence:

Arkansas decisions:

Judicial notice is taken of the fact that lager beer is malt and fermented liquor as a matter of common knowledge,

Waller *vs.* State, 38 Ark., 656;

That whiskey is an intoxicating liquor,

Edgar *vs.* State, 37 Ark., 219;

Of what is a turf race,

McLain *vs.* Huffman, 30 Ark., 428;

Of the occupation of certain territory in rebellion by the United States forces,

Rice *vs.* Shook *et al.*, 27 Ark., 137;

Of the period during which courts were closed by the war,

Hanks *vs.* Harris, 29 Ark., 323;

Of the existence of a municipal corporation and its rights to contract,

Alderman *vs.* Finley, 10 Ark., 423;

Municipal charters and the amendments thereto will be judicially noticed,

Bevins *vs.* Baxton, 23 Ark., 387;

That the town of Richmond is in Little River county, though formerly in Sevier,

Wilder *vs.* State, 29 Ark., 293;

That bank paper was the common medium of exchange in Arkansas in March, 1840,

Dillard *vs.* Evans, 4 Ark., 175;

Of the corporate existence of the Real Estate Bank of Arkansas,

McKiel *vs.* Real Estate Bank, 4 Ark., 592;

And of all matters connected with its organization, history, and dissolution,

Davis *et al.*, Adm'rs, *vs.* Hunt, 37 Ark., 594;

Of the seasons and of the course of agriculture,

Tomlinson *vs.* Greenfield, 31 Ark., 557;

That in September, 1866, the civil State government of Arkansas was provisional; commanders of the United States military forces had authority to arrest and imprison,

Belding *vs.* State, 25 Ark., 315;

With respect to the usages of trade and of "the general custom and usage of merchants as well as of the general customs of our own country as to things generally known,"

Davis *vs.* Hanley, 12 Ark., 645;

Of the day of the week a certain day of the month came on,

Robinson *vs.* State, 38 Ark., 548.

Dillard *vs.* Evans, 4 Ark., 175; suit on a note dated March 17, 1840, payable "in common currency of Arkansas:"

Held: "At that period bank paper constituted the common medium of exchange * * * and this court is bound judicially to take notice of the kind of circulating medium that was then in general use in the State. * * * The term 'common currency in Arkansas,' at the date of the bond sued on, meant bank notes or paper issues, which were then the general and universal currency of the State."

McKiel *vs.* The Real Estate Bank, 4 Ark., 592; debt on two notes; plea, usury and *nil debet:*

Held: "The bank, being a public corporation, was not required to be proved, as the court was bound judicially to take notice of it."

Conway *et al. ex parte*, 4 Ark., 302; l. c., 367:

Held: "The Real Estate Bank is a public corporation, and we are bound judicially to know the condition of her

liabilities and assets, for these are to be found in the general history of the country and in the reports of the legislature and her own sworn officers. The laws of commerce and the usages of trade, and the character of the exchanges as the circulating medium of the country, are always received as judicial evidence, and all contracts in reference to them must be construed and determined according to the existing state of things under which such agreements were executed."

Davis & Co. *vs.* Hanley, 12 Ark., 645; suit against drawers of a bill. The indorsers received notice of protest about middle of the forenoon on Monday. The first mail thereafter for the residence of the drawers departed Tuesday at 7 a. m. The notice to the drawers was deposited in the post-office on Tuesday after the departure of the 7 a. m. mail.

Held: " * * * it is clear that the diligence was sufficient to fix the drawers of the bill in question; because the evidence shows that the mail departed at the early hour of 7 a. m., which, even at that season of the year, was at least some two hours before the commencement of the ordinary proper mercantile hours of business for that day, as we know as 'a part of the general custom and usages of merchants' as 'well as of the general custom of our own country,' knew as a matter that is 'generally known.'"

"It is insisted that the proof fails to show that the offense (manslaughter) was committed in Pope county. This was not proved in those words, but there was testimony that it occurred at a point three miles southwest of Dover * * * The general situation of Dover, which was for years the seat of justice for the county, with reference to the county lines, was a matter of public notoriety, of which the court had notice without proof. That the county line could not

be reached within three miles was common knowledge; and if the jury found, as it might have done, on the evidence, that the homicide occurred within three miles of Dover that fixed it in Pope county."

Forehand *vs.* State, 53 Ark. 46 (13 S. W.).

THE GENERAL RULE.

"Three classes of facts naturally follow as many divisions of the rule, of which there can be no question, that courts will take judicial notice: *first*, matters of public law, which all are bound to know; *second*, matters so notorious as to be regarded as universally known; and, *third*, matters peculiarly within the cognizance of the particular court."

28 Am. Law Reg., 194.

"In fine, courts will generally take notice of whatever ought to be generally known within the limits of their jurisdiction."

Greenl. Ev., vol. 1, sec. 6.

In Swinnerton *vs.* Columbia Ins. Co., 37 N. Y., 174, Hunt, J., said:

"In fine, courts will generally take notice of whatever ought to be generally known within the limits of their jurisdiction, and where the memory of the judge is at fault, he may refer to such documents of reference as may be at hand, and he may deem worthy of confidence."

"A court sitting in a particular city is bound to know the general scenery of such city, and its division into streets and wards; the courts of a particular State to know the boundaries of the State and its divisions into towns and counties, and the limits of such divisions, and of its judicial districts; the positions of leading cities and villages in such State, and the natural boundaries of the State."

1 Whart. Ev., sec. 339.

PARTICULAR BOUNDARY LINES ARE NOTICED, THEIR RELATION TO EACH OTHER, JUXTAPOSITION OF STATES, COUNTIES, AND CITIES, AND THE LOCATION OF EACH WITH RESPECT TO THE OTHER, AND DISTANCES FROM THE PLACE WHERE THE COURT SITS, COURSE OF RIVERS WITHIN THE JURISDICTION AND GENERALLY, NAVIGABILITY, ETC.—IN FACT, ALL MATTERS OF PUBLIC CONCERN AND INTEREST WHICH ARE OPEN, NOTORIOUS, AND INDISPUTABLE, WHICH IS THE DETERMINING FACTOR, INCLUDING THE LOCATION OF LANDS DESCRIBED BY GOVERNMENT SUBDIVISION, SECTION, TOWNSHIP, AND RANGE, TOWNSHIP AND SECTION LINES, AND ALL OTHER MATTERS OF PUBLIC CONCERN AND INTEREST WHICH ARE PART OF THE EXPERIENCE AND COMMON KNOWLEDGE OF THE DAY ARE LEGITIMATE GROUNDS FOR THE JUDGMENT OF THE COURT.

In K. C., Ft. S. & G. R. R. Co. *vs.* Burge, 40 Kan., 736, judicial notice was taken *of the boundaries of Bourbon county, of the location of Ft. Scott in said county, and of the fact that a place two miles distant from Ft. Scott was in Bourbon county.* (Mr. Justice Brewer was then on the bench.)

Judicial notice will be taken of the constitution of the streets, squares, and public grounds of Boston in determining the proper construction of the statute as to authorizing an entry upon a public garden in building a subway.

Prince *vs.* Crocker, 166 Mass., 347.

"Taking judicial notice of the facts aforesaid, it is not difficult to ascertain that Moniteau county, where the crime is proved to have been committed, is one of the interior counties of this State. Nor, under the principle of the au-

thorities cited, will it exceed the limits of the license accorded to judicial notice, to be aware of the fact that California is the county-seat of Moniteau county, and if we may be aware of this, inasmuch as we know where the boundaries of Moniteau county are, we easily can ascertain that three miles west of California will not reach the western boundary of that county."

State *vs.* Pennington, 124 Mo., 388; l. c., 392.

VIOLATION OF CRIMINAL STATUTE AGAINST FISHING WITHIN LIMITS OF COUNTY.

The court took judicial notice of the fact that Wood island and Flag island were within the limits of Cumberland county.

State *vs.* Thompson, 85 Me., 189.

"The court takes notice of the civil divisions of the State; and we know there is a town called Batavia in the county of Genessee. We know also that there is no town of that name in the county of New York where the venue is laid."

Chapman *vs.* Wilder, 6 Hill, 475.

Courts take judicial notice of the towns in the State and that they are located in certain counties.

Vanderwerker *vs.* People, 5 Wend., 530.

Held by judicial supreme court of Massachusetts: "We think that the superior court might take judicial notice that the Connecticut river, above the dam at Holyoke, does not either by itself or by uniting with other waters, constitute a public highway over which commerce may be carried on with other States or with foreign countries * * * It is well known that the waters of the Connecticut river, at

the place where it is alleged that the defendant's steamboat was employed, can be used by vessels only for the transportation of persons and property between different places in Massachusetts. They are, therefore, waters not within the maritime jurisdiction of the United States."

Commonwealth *vs.* King, 22 N. E. (Mass.), 905.

In City Council of Montgomery *vs.* Montgomery and Wetumka Plank Road Co., 31 Ala., 76, it was judicially noticed that no part of the Tallapoosa river ran within the corporate limits of the city of Montgomery.

"I think we may take judicial notice that there is a lake on the island of Trinidad known as the Asphaltum lake, and assume that when in the specifications they used the words 'the best quality of refined lake asphaltum,' they meant asphalt from the Asphaltum lake in the Island of Trinidad."

Conde *vs.* City of Schenectady, 29 App. Div. (N. Y.), 607, 608.

Counterclaim for damages happening to goods in transit from Liverpool to New Orleans, the court said:

"It is well known, however, and it has been judicially recognized as a geographical fact that the River Mersey is filled with salt water and that the tide ebbs and flows to a very great height.

"If these goods came down the River Mersey (to Liverpool) it is more than probable that they were damaged in their transportation to Liverpool," etc.

Whitney & Co. *vs.* Gauche, 11 La. Ann., 432.

"The courts take judicial notice of such streams (Mississippi and its navigable tributaries) as they form a part of the geography of the country, and their navigability is known, as

forming a part of the common public history. For instance, we take judicial notice that the Ohio river, forming the southern boundary of the State, and the Wabash, for some distance above its confluence with the Ohio, are navigable for vessels freighted with commerce, and that they are used as commercial highways in the trade and commerce between different States."

Neaderhouser *vs.* The State, 28 Ind., 257, 267.

"This is not controlled, nor indeed could it well be, for we judicially know that this island (Rock island) is within the jurisdiction of the State of Illinois, and forms a part of its territory for judicial and all other purposes."

Gilbert *vs.* Manufacturing Co., 19 Ia., 319.

"The courts will take notice that the State of Missouri is east of the Rocky mountains. * * * In the case of the U. S. *vs.* La Vengeance (3 Dall. 297) the court judicially noticed the geographical position of Sandy Hook; and it may certainly take notice judicially of like notorious facts, as that the bay of New York, for instance, is within the ebb and flow of the tide."

Price *vs.* Page *et al.*, 24 Mo., 65.

"Kansas City and Wichita are large and universally known commercial centers in this country; the court will take judicial notice of their geographical location, and that transportation by railroad from these places is over lines outside the State of New York."

Parks *vs.* Jacob Dole Packing Co., 6 Misc. (N. Y.), 570.

Suit *vs.* Acceptor of Bill of Exchange:

Held: "It must be intended that the 'city of New York,' as expressed in the bill, is our great commercial emporium—a point at which quite half the revenue of the

nation is collected from duties on imposts—a place recognized by *almost numberless acts of Congress, both public* and private. This independently of the history (statistical and general) of the country, forces on us a knowledge of the geography of New York, and that it is *extraterritorium.*"

Dickinson *vs.* The Branch Bank at Mobile, 12 Ala., 54.

In Wood *vs.* Fowler, 26 Kans., 682, the court took judicial notice of the fact that the Kansas river was a navigable stream, and the opinion was delivered by Mr. Justice Brewer.

In State of Wisconsin *vs.* Cunningham, 15 L. R. A., 561, it is held that the court would take judicial notice of the location, general boundaries, and juxtaposition of the several counties, towns, and wards mentioned in the public statutes.

In Denny *et al. vs.* State of Indiana, 31 L. R. A., 727, l. c. 733, it is held that judicial notice will be taken of the location, boundaries, and juxtaposition of the several counties in the State.

In Olive *et al. vs.* Alabama, 4 L. R. A., 33, it is held that the court will take judicial notice of the fact that the whole of a certain river is within the State and above the ebb and flow of tides, and of the fact that the bed of the river was included within the surveys of the country.

We know judicially that the Indian Territory is beyond the jurisdiction of Texas,

Swafford *vs.* State, 3 Tex. App., 76;

Conner *vs.* State, 23 Tex. App., 378 (5 S. W., 189);

Of the boundaries of a county and of the location of lands described by government subdivision, as by township, range,

and section, and of the legal subdivisions thereof, and if the description of such subdivision shows the land to be in the county this is sufficient,

Campbell *vs.* West, 86 Cal., 200 (24 Pac. Rep., 1000);
Wilcox *vs.* Moudey, 82 Ind., 219;

The court being required to take judicial notice of the provisions of the city charter will notice the fact that a prior ordinance must have been passed under said city charter before the ordinance could have been enacted, and that a petition alleging passage of the second ordinance is good for that reason against a general demurrer,

City of St. Louis *vs.* Lang *et al.*, 131 Mo., 412;

Acts of Congress authorizing the survey and subdivision of public lands,

Priezer *vs.* Ex. Ins. Co., 6 Wis., 89;
Atwater *vs.* Schenck, 9 Wis., 160;
Sempler *vs.* Hager, 27 Cal., 163;
Papin *vs.* Ryan, 32 Mo., 21;
Dickenson *vs.* Breeden, 30 Ill., 279;

Nisi prius courts will take judicial notice of the incorporation of a city within a county and its ordinances,

Solomon *vs.* Hughes, 24 Kas., 211;

The location of the falls in the Ohio river will be judicially noticed, and also the fact that pilots were not appointed for any other falls in the State,

Cash *vs.* Auditor, 7 Ind., 227;

Also the divisions of land into sections and the directions from one quarter post to another,

Mossman *vs.* Dorrest, 27 Ind., 233;

The boundary lines of counties are noticed and also to determine what towns are included therein and to ascertain their area,

Ham *vs.* Ham, 39 Me., 363;
State *vs.* Jackson, 39 Me., 291;
Board of Comm'rs *vs.* Skitter, 13 Ind., 235;
Indianapolis, etc., R'y Co. *vs.* ——, 16 Ind., 43;
Salyer *vs.* Romanet, 52 Tex., 562;
Hoffman *vs.* State, 12 Tex. App., 406;
State *vs.* Reader, 50 Va., 527;

And that books known as plat books are and have been for many years kept by the county recorder in which plats of towns, cities, and additions are recorded,

Miller *vs.* Indianapolis, etc., 123 Ind., 196;

What streams in the State, if any, are tidal streams,

Worker *vs.* Allen, 72 Ala., 456;

Of the geography of the State and the enumeration of the inhabitants thereof taken as required by law,

Parker *vs.* State (Ind.), 32 N. E. Rep., 836;

And the length of time ordinarily required therefor,

People *vs.* Rice, 135 N. Y., 473;

And without averment and proof of the fact and within the State will know to what county they belong,

Indianapolis, etc., R'y Co. *vs.* Case, 15 Ind., 42;
Martin *vs.* Martin, 51 Me., 366;
Hite *vs.* State, 9 Yerg. (Tenn.), 381;
Vanderworker *vs.* People, 5 Wend., 530;
Harding *vs.* Strong, 42 Ill., 148;

"Transactions and objects which necessarily connect themselves with, and form a part of the general history or geography of the country ought to be taken notice of."

Payne *vs.* Treadwell, 16 Cal., 231;

Courts will judicially recognize the public surveys and legal subdivisions of the public land,

Atwater *vs.* Shenck, 9 Wis., 160;
Hill *vs.* Bacon, 43 Ill., 477;
Mossman *vs.* Forrest, 27 Ind., 233;
Wright *vs.* Phillips, 2 Green (Iowa), 191;

That portions of a public road between two points are within a certain county,

Indianapolis, etc., R'y Co. *vs.* Case, 15 Ind., 2;
Indianapolis, etc., R'y Co. *vs.* Paramore, 12 Ind., 406;

The relative situations of a city and a river,

City Council, etc., *vs.* Montgomery, etc., Co., 31 Ala., 76;
Winnipiseogee Lake Co. *vs.* Young, 40 N. H., 42;

Of the fact that a particular river did not through its entire range lie in one State,

Cummings *vs.* State, 13 Mich., 70;

The navigability of large streams,

Wood *vs.* Fowler, 26 Kas., 682 (40 Am. Rep., 330);
Neaderhouser *vs.* State, 28 Ind., 257;

Where certain streets in the city of San Francisco were designated upon an official map of the city, was held that the court was not only bound to take judicial notice thereof where marked on the diagram filed in the case, but also of the relations of such streets with each other and the directions in which they run,

Brady *vs.* Page, 59 Cal., 52;

The English courts announce the same rules; thus, that the colony of Victoria is beyond seas,

Cooke *vs.* Wilson, 2 Jur. (N. S.), 1094 (1 C. B. N. S., 153);

And also that a certain place lies east or west of Greenwich,

Curtis *vs.* March, 4 Jur. (N. S.), 1112;

As part of experience and common knowledge of the day, courts will take judicial notice that certain provinces are in a foreign country, and that they have governments and courts proceeding according to the usual course of the common law,

Lazier *vs.* Wescott, 26 N. Y., 146;
Cooke *vs.* Wilson, 37 Eng. Law & Eq., 361;

Also the location of the principal rivers of the State, what sections they traverse, and what towns or cities they lie in,

City Council *vs.* Montgomery *vs.* M. & W. Plank Road Co., 31 Ala., 79;

The tendency of the courts is to extend as to the scope of judicial knowledge so as to keep proper pace with the rapid advances of art, science, and general knowledge, "but there is a prudent limitation put upon this principle, so as to confine it to matters of a general and public nature, or such as do not concern individuals or local communities. The facts must be of such age or duration as to have been established as a part of the common knowledge of well-informed persons at least,"

Wiggins Ferry Co. *vs.* C. & A. R'y Co., 5 Mo., 347;

In an action against a street railroad company for damages to property, it was held that the court would take judicial notice of the fact that extreme ill-will existed against the defendant which but a few weeks had culminated in mob violence,

Geist *vs.* Detroit City, 91 Mich., 446;

It is not necessary in order for the court to exercise its function of judicial notice that the facts in question should have been formally recorded in any written book, written history, or book of science,

Salomon *vs.* ——, 28 Ala., 83;

Austin *vs.* State, 101 Tenn., 563;

The courts have no right to be ignorant of current phrases which everybody else understands, and should take judicial notice thereof, and this was held in an action for libel,

Bailey *vs.* Kalamazoo Publishing Co., 40 Mich., 251;

The Indiana supreme court, as a part of the history of that State, takes judicial notice that Clark's grant was sur-

veyed and located adjacent to the falls of the Ohio river, in the counties of Clark, Floyd, and Scott, and also that the town of Clarksville was located and laid out abutting the Ohio river within said grant, in the counties of Clark and Floyd,

Carr *vs.* McCampbell, 61 Ind., 97;

As a part of the things generally known, courts will notice the nature and utility of telephones,

Wolfe *vs.* Missouri Pac. R'y, 97 Mo., 473;
Globe Printing Co. *vs.* Stahl, 23 Mo. App., 451;

And of the benefit of art of photography as a proper means of producing correct likenesses of persons and objects,

Luke *vs.* Calhoun Co., 52 Ala., 115;
Udderzook *vs.* Com., 76 Pa. St., 340;

Boundaries of the United States will be judicially noticed by the courts of Texas, certainly so far as they coincide with the boundaries of the State,

Ogden *vs.* Lund, 11 Tex., 688;

Courts will judicially notice the precise boundaries of local subdivisions,

Boston *vs.* State, 5 Tex. App., 383 (32 Am. Rep., 575);
Edwards *vs.* Davis, 3 Tex., 321;

Of State boundaries,

Gilbert *vs.* Water Power Co., 19 Ia., 319;
State *vs.* Pennington, 124 Mo., 388;
Thomas *vs.* Stigers, 5 Pa. St., 480 (39 Pa. St., 486).

In the last case it was held that the courts of Pennsylvania would judicially notice the agreement between Lord Baltimore and William Penn relative to the boundary line between Maryland and Pennsylvania.

The corporate existence and names of the several counties within the State,

Lyell *vs.* Lapeer County, 6 McLean (U. S.), 446;
Trammell *vs.* Chambers County, 93 Ala., 388;

The geographical position of the county,

Bond *vs.* Perkins, 4 Heiskel (Tenn.), 364;

The courts of the State will judicially notice the area of established counties and their boundaries,

Jackson *vs.* State, 147 Ind., 476;
Smith *vs.* Flournoy, 47 Ala., 345;
Steinmetz *vs.* Versailles Turn P. Co., 57 Ind., 457;
Terre Haute, &c., R'y Co. *vs.* Pearce, 95 Ind., 496;

Where the limits of a town appear by its act of incorporation they will be judicially noticed by the courts of the State,

Martin *vs.* Martin, 51 Me., 366;

Judicial notice will be taken of the governmental surveys and subdivisions of lands thereunder,

Webb *vs.* Mullins, 78 Ala., 111;
Bittle *vs.* Stewart, 34 Ia., 224;
Sever *vs.* Lyons, 170 Ill., 395;
Richardson *vs.* Hedges, 150 Ind., 53;
Stodard *vs.* Sloan, 65 Ia., 680;
Baxter *vs.* Causton, 41 Mich., 448;

The relative situation of subdivisions of a county will be judicially noticed,

Prieger *vs.* Ex. Mut. Ins. Co., 6 Wis., 89;
Buchanan *vs.* Whitham, 36 Ind., 257;

Courts will also judicially notice township and section lines,

Keile *vs.* Yellow Head, 80 Ill., 208;

Courts will also notice the area of the Government quarter section of land,

Quinn *vs.* Windmueller, 67 Cal., 461;
Meacham *vs.* Sunderland, 10 Ill. App., 123;

The court will take judicial notice that the Miller County tract is located between the Illinois and Mississippi rivers, and that all of it is west of the fourth principal meridian,

McNutt *vs.* Turner, 16 Wall., 352;

The courts will take judicial notice that the limits of a city are coextensive with the limits of the county,

Reg *vs.* St. Maurice, 16 Q. B., 908 (71 E. C. L., 908; 20 L. J. M. C., 221, 15 Jur., 559);

The court knows judicially that there is a town in the county of Wilkinson named Woodfield and there is but one,

Morgan *vs.* State, 64 Miss., 511;

and that the court will notice in what county said town is located,

State *vs.* Reader, 60 Ia., 527;

Courts will take judicial notice that St. Louis and Chicago are great marts of trade for stock,

White *vs.* Mo. Pac. R'y Co., 19 Mo. App., 400;

Courts will judicially notice all old and well-known streets of a city and that they are public highways,

State *vs.* Ruth, 14 Mo. App., 226;

Whittaker *vs.* 8th Ave. R'y Co., 5 Robt. (N. Y.), 650;

Courts will take judicial notice of the county in which a public highway is located where the lands affected by it are described by certain townships and ranges,

Adams *vs.* Huntington, 114 Ins., 66;

Where a stone wall is erected within three feet eight inches of a window judicial notice will be taken that it will diminish the passage of light and air,

Ware *vs.* Chew, 43 N. J. Eq., 493;

Of county boundaries and the location of lands described by Government subdivision as by township, section, and range and the legal subdivision thereof,

Campbell *vs.* West, 86 Cal., 197;

That a street is in a certain part of the city,

Walsh *vs.* Mo. Pac. R'y Co., 102 Mo., 589;

Of the relative distances from a certain place to another part of the same State and the neighboring States,

Jamison *vs.* Ind. Natural Gas Co., 128 Ind., 555;

That certain rivers are public highways,

Com. *vs.* Cunningham, 150 Mass., 221;

Of the location and relative situation of lands officially surveyed and mapped out under the authority of acts of Congress,

Knabe *vs.* Burden, 88 Ala., 436;
Peck *vs.* Sims, 120 Ind., 345;

That in Wisconsin the capacity of many navigable streams has been increased for lumbering purposes by a system of dams,

Tewksbury *vs.* Schulenburg, 41 Wis., 584;

Of the distance between well-known cities of the United States and of the usual rate of speed of railway trains between them,

Pearce *vs.* Langfit, 101 Pa. St., 507 (47 Am. Rep., 737);
Manning *vs.* Gasharie, 27 Ind., 399;
Fitzpatrick *vs.* Pappa, 89 Ind., 17;

That at a certain time the region of Pike's Peak was within the Territory of Kansas,

Carey *vs.* Reeves, 46 Kas., 571;

That certain lands are located within the Indian Reservation,

French *vs.* Lancaster, 3 Dak., 346;

That a particular legal subdivision of a section of land in the State is not a fractional subdivision,

Peck *vs.* Sims, 120 Ind., 345;

Surveys of public lines made under public statute are proper subjects of judicial notice,

Wright *vs.* Phillips, 2 Greene, Iowa, 191;
Atwater *vs.* Schenck, 9 Wis., 160;
Dickinson *vs.* Breeden, 30 Ill., 279;

That there can be no such description in a Government survey as the southeast side of a quarter section,

Buchanan *vs.* Whitman, 36 Ind., 257;

And of the areas of counties within the State and the boundary lines of such counties,

Board of Commissioners *vs.* Spitler, 13 Ind., 235;
Hamm *vs.* Hamm, 39 Me., 263;

And of the division of each section into forty-acre tracts,

Prigger *vs.* Exchange Ins. Co., 6 Wis., 89;
Atwater *vs.* Schenck, 9 Wis., 160;
Hale *vs.* Bacon, 43 Ill., 477.

In Oppenheim *vs.* Wolf *et al.*, 3 Sandf. Ch., 571, it is held that facts which are part of the experience and common knowledge of the day are legitimate grounds for the judgment of the court. This principle is applied to the usual duration of voyages across the Atlantic by steam and other packet ships.

In Hunter *vs.* New York, Ontario & Western R'y Co., 6 L. R. A., 246, it is held that judicial notice may be taken of the height of the human body and the measurements of its several parts.

If the State court is required to notice local or private laws, the Federal court in that State must do so,

Beaty *vs.* Knoer, 4 Pet., 152;
Renaud *vs.* Abbott, 116 U. S., 277.

In Owings *vs.* Hull, 9 Pet., 624, it is said by Mr. Justice Story that the Federal courts generally will notice State constitutions and laws the same way that they notice the acts of Congress.

Judicial notice will be taken of the existence of quasi-public corporations, such as a railroad corporation,

13 Ct. of Cl., 117;
Baltimore, etc., R. R. Co. *vs.* Sherman, 30 Gratt. (Va.), 602;

That at a certain time a certain section of the country was unsettled,

U. S. *vs.* Wallamant *vs.* C. M. Co., 42 Fed. Rep., 351;

Of the rules of navigation,

The "Scotia," 14 Wall., 170 (20 L. ed., 822);

Of the distance between cities in different States,

Mutual Benefit Life Ins. Co. *vs.* Robinson, 58 Fed. Rep., 723;

The courts are bound to take judicial notice of public facts and geographical positions,

The "Apollon," 9 Wheat., 362; l. c., 374;

(This case was cited and approved in Peyroux *vs.* How., 7 Pet., 342 (8 L. ed.), 707.)

Of the boundaries of different States,

Thorson *vs.* Peterson, 9 Fed. Rep., 517;

Federal courts will take judicial notice that the lands surrounding Seattle harbor had for years been selected and known as the site of a city, and are hence exempt from settlement under the homestead and exemption laws,

Ex parte Peterson, 57 Fed. Rep., 883.

In Taylor *vs.* Barclay, 2 Sim., 213, a pleading alleged that a certain government was recognized by His Majesty's government, and the court treated this allegation as incorrect, because it took judicial notice of the fact that the statement made was not true; and upon the same principle in

People *vs.* Water Front Co. (Cal.), 50 Pac. Rep., 305,

the court sustained a demurrer to a declaration which alleged title, which the court knew, as a matter of judicial knowledge, did not exist. Upon the same principle—

In State *vs.* Lingle, 128 U. S., 528, it is held that matters of which the court takes judicial notice may be referred to by counsel in argument.

In United States *vs.* La Vengeance, 3 Dall., 297; l. c., 301, it is held that this court will take judicial notice of the fact that the town of Sandy Hook is located upon the water.

In Brumagin *vs.* Bradshaw, 3 Cal., 40, the court following this case took judicial notice of the fact that Potrero in the year 1850 was separated from the city of San Francisco and that it is now a part of said city.

This case was also cited as authority in

Hipes *vs.* Cochran, 13 Ind., 177,

where the court took judicial notice of the facilities of travel to determine the time necessary to travel between two certain points.

In Peyroux *vs.* Howard, 7 Pet., 324 (8 L. ed., 700), the court held that it was "authorized judicially to notice the situation of New Orleans for the purpose of determining whether the tide ebbs and flows as high up the river as that place."

This case was cited in Lands *vs.* Cargo, &c., 4 Fed., 480, where the court took judicial notice of the fact that waters upon which a contract was performed were navigable, and in *Ex parte* Lane, 6 Fed. Rep., 37, where judicial notice was taken that the Dominion of Canada is a British possession, and in Forehand *vs.* State, 53 Ark., 48 (13 S. W. Rep., 728), where it is held the court, as a matter of common knowledge, will take judicial notice of the fact that the county line is more than three miles from a certain town, and in State *vs.* Wagner, 61 Me.. 186, where the indictment was held sufficient which alleged that a murder committed in a certain place (commonly known) was located in a certain county, and in Crary *vs.* Port Arthur and C. & D. Co. (Tex.), 47 S. W. Rep., 940, the court took judicial notice that the tide ebbs and flows in Sabine pass.

In Peyroux *vs.* Howard, 7 Pet., 324, the jurisdiction of the court depended upon the fact whether or not the tide ebbed and flowed as high up the Mississippi river as New Orleans. The court said:

"But we think we are authorized judicially to notice the situation of New Orleans, for the purpose of determining whether or not the tide ebbs and flows as high up the river as that place. * * *

"It cannot certainly be laid down as a universal, or even as a general proposition, that the court can judicially notice matters of fact. Yet it cannot be doubted that there are many facts, particularly with respect to geographical positions, of such public notoriety, and the knowledge of which is to be derived from other sources than parol proof; which the court may judicially notice. Thus in the case of the U. S. *vs.* La Vengeance, 3 Dall., 297, the court judicially noticed the geographical position of Sandy Hook. And it may certainly take notice judicially of like notorious facts, as that the bay of New York, for instance, is within the ebb and flow of the tide."

The same ruling is made in Parks *vs.* Hunt, 7 Pet., 343.

In Gibbons *vs.* Ogden, 9 Wheat., 1; l. c., 220, the court took judicial notice of the fact that "in our western waters their (steamboats) principal employment is the transportation of merchandise, and all know that in the waters of the Atlantic they are freqently so employed."

Judicial notice will be taken of the events constituting the history of the country, as well as of transactions and objects intimately connected therewith, and in this connection as to the admission of States into the Union,

Wright *vs.* Hollingsworth, 1 Pet. (U. S.), 165;

Courts will take judicial notice of their State's territorial extent as well as its civil and political division,

United States *vs.* Jackson, 104 U. S., 41;

Thorson *vs.* Peterson, 9 Fed. Rep., 517;

United States *vs.* Johnson, 2 Sawy., 482;

The Federal courts will take judicial notice of the boundary lines between States,

Coffee *vs.* Groorer, 123 U. S., 11;

Judicial notice will be taken of the fact that taxable property is not assessed at its full value, but only at a per cent. of its actual value,

Railroad, &c., *vs.* B'd Equalization, 85 Fed. Rep., 302.

In Mutual Benefit Life Ins. Co. *vs.* Robinson, 58 Fed. Rep. (C. C. A.), 723; l. c., 723, it is held:

"That the United States circuit court had the right to take judicial notice of the fact that Dubuque, Iowa, was more than one hundred miles from Asheville, N. C., the place where certain depositions were taken. This was held on motion to suppress depositions because there was no evidence before the court that the witness was not more than one hundred miles from the place of trial at Dubuque."

Following the same line of reasoning, it was said, in an important case:

"I am at liberty to take judicial cognizance of the fact that a very large interstate trade exists in fresh-dressed meats. I am at liberty to take cognizance also of geographical distances, and of the fact that the Virginia statute, in imposing a charge of one cent per pound on all fresh meats offered for sale at one hundred miles or more from the place of slaughter, imposes this charge on all meats brought from other States of the Union; and, as to those cities of Virginia having fifteen thousand inhabitants, imposes it upon meats brought from all or nearly all that portion of Virginia lying west of the Blue Ridge mountains."

An act was held void because violative of interstate-commerce clause of Constitution which was developed by an inspection of the act *in connection with facts judicially known*,

In re Rebman, 41 Fed., 867;

In this connection, it has been held that an American court may take judicial notice of the fact that the water in the River Mersey, in England, is salt, and that the tide ebbs and flows therein to a great height,

Whitney *vs.* Gausche, 11 L. A. Ann., 432;
Metzger *vs.* Post, 44 N. J. Law, 77;
Wood *vs.* Fowler, 26 Kans., 687 (40 Am. Rep., 330);

The courts will take judicial notice of the fact that a place lies east or west from Greenwich, and consequently has a time different from that of Greenwich,

Curtis *vs.* March, 4 Jur. (N. S.), 1112;

In taking judicial notice of prominent geographical facts and features of the country, the court will take judicial notice of the geographical position of islands,

State *vs.* Wagner, 61 Me., 178;

The Federal courts will take judicial notice of the fact that a railroad company is authorized by an act of Congress to build and maintain a bridge over navigable water,

Pa. R'y Co. *vs.* Baltimore, etc., R'y Co., 37 Fed. Rep., 129.

In Lyon *vs.* Marine Collector of Customs, 55 Fed. Rep. (C. C. A.), 964; l. c., 966, a certain fact with respect to shipping is held to be one of which judicial notice will be taken as of common knowledge taught by all text-books upon the subject and also all facts of general history.

It is held by Mr. Justice Gray, in Jones *vs.* United States, 137 U. S., 202, that:

"All courts of justice are bound to take judicial notice of the territorial extent of the jurisdiction exercised by the government whose laws they administer or its recognition or denial of the sovereign power as appearing from public acts of the legislature not formally put in evidence nor in accordance with the pleadings."

And the court took judicial notice that the island of Navassa, in the Caribbean sea, was, at the time a murder thereon was committed, under the sole and exclusive jurisdiction of the United States.

The last case was cited as authority for the action of the court in taking judicial notice of an international boundary line which included a portion of Behring sea and generally the limits of the boundaries so fixed,

United States *vs.* James G. Swan, 50 Fed. Rep., 108; l. c., 111;

That the Indian Territory is a grazing country where cattle in large numbers run at large,

G. C. & S. F. R'y Co. *vs.* Washington, 49 Fed. Rep., 447 (4 U. S. App., 421);

Of new processes of utility in facilitating trade,

Richards *vs.* Mich. Cent. R'y Co., 40 Fed. Rep., 165.

In Phillips *et al.*, Ex'rs, *vs.* City of Detroit, 111 U. S., 604 (28 L. ed., 532), the court held, in passing upon the validity of an alleged improvement, the court will take judicial notice of matters of common knowledge and of things in common use to determine whether the invention under consideration is patentable.

In Ohio Life Ins. Co. *vs.* Debolt, 16 How., 416; l. c., 435 (14 L. ed., 997), it is held that judicial notice will be taken of the fact as a matter of public history that almost every bill for incorporation is drawn by the incorporators.

In United States *vs.* Teschmaker, 22 How., 392; l. c., 405 (16 L. ed., 353), it is held that, though not offered in evidence, this court will take judicial notice of the facts shown with respect to public lands in the papers composing the Mexican archives showing the departmental assembly records, and this court will consult the same.

This same proposition was announced by this court in Caha *vs.* United States, 152 U. S., 222, where it was held that judicial notice will be taken of the regulations of a department of the Government; and also in Kirby *vs.* Lewis, 39 Fed. Rep., 77, where it is held that the court can consult official reports relating to swamp lands, though not formally offered in evidence.

In Davidson *vs.* Gibson, 56 Fed. Rep., 443; l. c., 446, where it is said the court, in making up its opinion of the law of the case, is not limited in its researches to legal literature; it may consult works on science, or art, or history touching the topic on trial, and may appeal to public archives for this purpose.

(Citing—

Wharton Ev., secs. 282, 336;

Brown *vs.* Piper, 91 U. S., 42;

U. S. *vs.* Teschmaker, 22 How., 392;

Kirby *vs.* Lewis, 39 Fed. Rep., 66;

Eureka Vinegar Co. *vs.* Gazette Print Co., 35 Fed. Rep., 570);

and the court accordingly held that it had the right to consult public laws of the Creek Nation.

Courts will judicially notice the fact that American corporations have been in the habit of openly making contracts in England,

Bank of Augusta *vs.* Earl, 13 Pet.; 590.

"Hoppers with chutes beneath them have been used for a dozen different purposes, but principally for grain elevators, by means of which vessels lying alongside a wharf are loaded in a fraction of time required by hand or animal power. Indeed, these devices are so common that we think judicial cognizance may be taken of them."

Black Diamond Co. *vs.* Excelsior Co., 156 U. S., 616.

"The courts of the United States take judicial notice of the ports and waters of the United States where the tide ebbs and flows, of the boundaries of the several States and judicial districts, and of the laws and jurisprudence of the several States in which they exercise jurisdiction. Courts will take notice of whatever is generally known within the limits of their jurisdiction; and if the judge's memory is at fault he may refresh it by resorting to any means for that purpose which he may deem safe and proper."

Brown *et al. vs.* Piper, 91 U. S., 42.

The court will take judicial notice of a thing which is in common knowledge and use of the people through the country. It therefore holds that reissued letters patent No. 5748, granted to Matthias Terhune for an alleged new and useful improvement in corner sockets for show cases, are void for want of novelty.

Terhune *vs.* Phillips, 99 U. S., 592.

In Brown *vs.* Spilman, 155 U. S., 670, the court took judicial notice of the manner in which persons bore for oil, and that "when oil or gas is found in paying quantities it is not usual to consume it or reduce it to use at the wells, but it is conducted in iron pipes to large tanks or reservoirs, whence it is distributed by other pipes to the place of consumption, often many miles distant."

"The new course of trade to which the present war has given rise is notorious; and this court has abundant evidence in regard to it upon its own records. Neutral vessels, almost always under the British flag, are cleared from England with papers giving an ostensible destination, for both vessel and cargo, to Cardenas in Cuba, or Nassau, N. P., or Matamoras, on the Rio Grande in Mexico, all in neutral waters. Those destinations are used merely for call or transshipments, either as a new point of departure for a further voyage of the same vessel to a port of the enemy, or as a place of transshipment of the cargo to another vessel, in which it may enter the country of the enemy, the cargo being composed, in almost every instance, more or less, of articles contraband of war. * * *

* * * "The court will take judicial cognizance of the well-known facts that Matamoras lies on the right bank of the Rio Grande, the river which forms the boundary line between Mexico and the United States at that point, several miles up from the mouth of the river, and nearly opposite the town of Brownsville in Texas; that the river is very narrow at that place; and that, at the mouth of the river, is a bar which at all times prevents the entrance into the river of a vessel drawing as much water as the "Peterhoff;" she drawing, as was admitted by the counsel for the claimants at the hearing, about sixteen feet."

The "Peterhoff," Blatch. Prize Cases, 463; l. c., 509 and 521.

Treaties made by the Federal Government with the Indian tribes or with a foreign government are part of the supreme law and possess the full power and efficacy of an act of Congress,

Constitution, art. VI, cl. 2;
Holmes *vs.* Jemison, 14 Pet., 569;
Doe *vs.* Braden, 16 How., 635;
Stein *vs.* Lynham, 10 Otto, 483;

And all courts are bound to take judicial notice of their existence, dates, character, and contents, *and of the rights of persons under them*,

U. S. *vs.* Payne, 2 McCrary, 289;
U. S. *vs.* Reynes, 9 How., 127;
Foster *vs.* Neilson, 2 Pet., 314;
U. S. *vs.* Arredondo, 6 Pet., 691;

Public acts providing for surveys and things done thereunder,

Caha *vs.* United States, 152 U. S., 211;

Thus the courts notice the situation of quarter sections under such surveys,

Prigger *vs.* Exchange Ins. Co., 6 Wis., 89;
Dickinson *vs.* Breeden, 30 Ill., 279;

And also of their areas,

Quinn *vs.* Windmueller, 67 Cal., 461;

The treaties made by the United States are the law of the land, and the Federal courts not only notice the treaties themselves, but also public acts and proclamations and the

government with whom they are made in carrying them into effect,

United States *vs.* Reynes, 9 How., 127;

Both State and Federal courts, without pleading or proof, judicially notice treaties made by the General Government with foreign States or Indian tribes,

Montgomery *vs.* Deeley, 3 Wis., 709;
Lacroiz *vs.* Sarrazin, 15 Fed. Rep., 489;

And this recognition embraces the date of the consummation of such treaties, *as well as the particular rights and duties thereby imposed,*

Carson *vs.* Smith, 5 Minn., 578;
Dale *vs.* Wilson, 16 Minn., 525.

In Collson *vs.* Hope, 75 Fed. Rep., 758; l. c., 761, the court took judicial notice of the treaty between the United States and Russia under which the Territory of Alaska was acquired, the protocol and transfer of October 18, 1867; also of the map of New Archangel or Sitka attached and made a part of said protocol, *and, consulting that map,* held that the United States did not acquire title under the terms of the treaty to a certain lot located in Sitka.

In Hoyt *et al. vs.* Russell, 117 U. S., 401 (29 L. ed., 914), it is said:

"It is undoubtedly true that judicial notice is not taken of purely private concerns, *when they are not connected with or necessarily involved in a matter of public nature;* but it is otherwise when they are so connected or involved, for example, a court will take notice of the *boundaries of the State or Territory,* where it holds its sessions, *and of judicial dis-*

tricts and municipal subdivisions within it. If the public surveys have established the *distance from its capital to any such subdivision, the court will take judicial notice of the fact;* and if the property be shown to be within that subdivision, its distance also from the capital will be judicially noticed; *notice of the general fact embracing all the facts included in it.* In the present case, the court below was required to take notice of the extent of its jurisdiction, not only of the subjects placed by and under its cognizance, but of its extent territorially. It should have been known judicially whether the laws of the Territory, which it was appointed to expound, were in operation with reference to a subject brought before it in the regular course of procedure. It was bound to know whether they were in force *in the township designated in the county of Lewis and Clarke* on the 13th day of May, 1873, and that necessarily involved a knowledge of the distance from the capital of the Territory. It may be that the judge's information on the subject was at fault and calculations and inquiries on the subject may have been necessary. *Such is the case with reference to a great variety of subjects of general concern of which courts are required to take judicial notice.*

"Information to guide their judgment may be obtained by reference to original documents in the public archives or to books of history or science or any other proper source.

"*In this case it appears by the Government maps of the Territory upon which the public surveys are marked that the distance from the seat of government to the nearest point of the township* in which the mining ground in controversy is situated exceeds seventy-five miles. Act of May 8th, 1873, was not, therefore, in force there on the 13th of May, the date of the discovery of the Mammoth lode. The court having become informed on this subject should have so declared and its conclusion would not have been open to contest before the jury. It erred, therefore, in excluding the notice of the defendant's location for the omissions stated because no proof was offered

of the distance of the disputed ground from the seat of government where the act took effect on the day of its passage. The court said if there were any exceptions to it by reason of the distance of the Mammoth lode from that place, the defendants should have made the fact appear by proof holding that the act not being complied with the notice was inadmissible in evidence."

The opinion in this case was delivered by Mr. Justice Field and the judgment of the lower court was reversed and the cause remanded for new trial because the trial court refused to take judicial notice of the distance between the mining claim and the capital of the Territory, so as to bring the case within the terms of the act of the Territory of Montana under discussion, and it was held further that "while it is true that the courts declare that the function of judicial notice will be exercised with caution, this caution *is exercised only to determine whether the requisite notoriety exists.*"

The court will take judicial notice that a place at which an offense was committed is within its jurisdiction,

Hays *vs.* Com., 14 S. W. Rep., 833;

That a certain town is the county-seat of a certain county,

Cole *vs.* Seagraves, 88 Cal., 103;

And also that a certain county is included in a certain judicial district,

Reagan *vs.* Farmers' Loan & Trust Co., 154 U. S., —;

Proof will not be required whether a certain act was in force at a certain time,

Pickard *vs.* Pullman Southern Car Co., 117 U. S., 45;

And without proof geographical positions will be noticed,

U. S. *vs.* La Vengeance, 3 Dall., 301;

The "Apollon," 9 Wheat., —; l. c., 374;

Parks *vs.* Hunt, 7 Pet., 342;

And of the value of mail service in the State of Ohio,

Matthews *vs.* McStea, 91 U. S., 12;

And of a well-known map to which all recorded conveyances refer,

Patch *vs.* White, 117 U. S., 220;

Morris *vs.* United States, 174 U. S., 269;

In Kansas City *vs.* Smart *et al.*, 128 Mo., 272; l. c., 298, it is said:

"Finally, it is claimed the proceedings must fall because the record nowhere discloses the property sought to be condemned is in the State of Missouri or Jackson county. As to this it will suffice to say that the charter of Kansas City is a public act, of which we are required to take notice. By section 2, article 1, of the charter, it is provided that the corporate limits of Kansas City shall include all that district of country in the county of Jackson, State of Missouri, setting forth the boundaries of the surveys of the United States Government, the State line and the Missouri river. The ordinance is the act of this incorporated city, and the description of the streets upon which this improvement was proposed clearly brings it within the corporate limits of Kansas City."

And in Texas and Pacific Railway Co. *vs.* Cody, 166 U. S., —; l. c., 610, it is said:

"If in this case plaintiff had simply described defendant by its name, without more there would seem to be no ques-

tion that, as the corporation was judicially known to be a Federal corporation, defendant would be entitled to remove the case on proper allegations in its petition; and we think this necessarily follows, where, by some mistake, or otherwise, the defendant is erroneously stated to be created under State laws. Here defendant was described as 'a private corporation, created and existing under the laws of the State of Texas,' and this was repeated in an amended petition, filed in the circuit court; but no motion to remand was made, nor was the propriety of the removal questioned in any way. Possibly the pleader did not intend to deny the Federal character of the company, *but whether so or not, no issue was or could be made as to the source of its corporate existence.*"

In Silvey *vs.* Summer *et al.*, 61 Mo., 253, it is said:

"In addition to that, an examination of a sectional map of this State, discloses that although Morgan county lies north of the Osage river, yet in consequence of a large bend in that stream, the land in suit is in fact on the south side of that bend, but still in Morgan county."

WITH RESPECT TO THE PARTICULAR COURSE AND LOCATION, CONSTRUCTION, AND PUBLIC CHARACTER OF RAILROADS AS PUBLIC HIGHWAYS AND THE MODE AND MANNER AND GENERAL REGULATIONS UNDER WHICH THEY ARE OPERATED.

In G. C. & S. F. R'y Co. *et al. vs.* State, 10 S. W. Rep., 81; l. c., 82, it is said:

"In Wharton on Evidence our own law adopts the position that reason and evidence are the co-ordinate features which go to make up proof, and that the judge in trying a case must not only exercise his own intellectual faculties in construing and applying evidence but must draw on his

own sources of knowledge or such information as is common to all intelligent persons of the same community. Such information must not only thus be common but must be of indisputable truth. When it becomes disputable it ceases to fall under the head of notoriety."

1 Whart. Ev., sec. 329.

The Supreme Court of the United States say:

"It certainly cannot be laid down as a universal or even as a general proposition that the court can judicially notice matters of fact, yet it cannot be doubted that there are many facts, particularly with reference to geographical positions of such public notoriety, and the knowledge of which is to be derived from other sources than parol proof, which the court may judicially notice."

Thus in the case of U. S. *vs.* "La Vengeance," 3 Dall., 297, the court judicially notices the geographical position of Sandy Hook.

"And it may certainly take notice judicially of like notorious facts, as that the bay of New York, for instance, is within the ebb and flow of the tide."

Peyroux *vs.* Howard, 7 Pet., 324.

"The court is bound to take judicial knowledge of the leading geographical features of the land, the minuteness of the knowledge or expected view in inverse proportion to the distance."

1 Whart. Ev., 339.

The principle has been applied in various ways, as the following cases will show:

Trenier *vs.* Stewart, 55 Ala., 458;
Gibson *vs.* Stevens, 8 How., 399;
Vanderwecker *vs.* People, 5 Wend., 530;

Pearce *vs.* Langfit, 101 Pa. St., 577;
Steinmetz *vs.* Turnpike Co., 57 Ind., 457;
Tewksbury *vs.* Schulenberg, 41 Wis., 584;
Walker *vs.* Allen, 72 Ala., 456;
Oppenheim *vs.* Wolf, 3 Sanf. Ch., 571;
Neaderhouse *vs.* State, 28 Ind., 257.

In Railway Co. *vs.* Rushing, 69 Tex., 306 (S. C., 6 S. W. Rep., 834), Chief Justice Willie says:

"It may be that this court, judicially knowing the geography of the State, might take notice of the general jurisdiction of these two roads, as fixed by the statutes under consideration that their lines must necessarily cross each other, and could, therefore, treat them as connecting lines and not parallel to each other, but as to whether they are competing lines, we could have no judicial knowledge whatever.

"This latter proposition as a general rule, and as applied to the case then before the court, is undoubtedly correct. Whether two roads which intersect each other at a certain point are competitors for freight or not must depend upon a variety of circumstances not known to the court.

"But the varieties stated show that we must take notice of the geography of the State and at least of its navigable streams. It is a matter of history that important lines of railroad, once established, have remained as fixed and as permanent in their course as the rivers themselves. They supersede, in the main, all other means of travel between the points which they touch and become as well, if not better, known than any other geographical feature of the country. Their locality becomes 'notorious and indisputable,' for instance, could we doubt that the Houston and Texas Central road runs from Houston to Tyler, and that the Gulf, Colorado & Santa Fe touches within its line the same point?

"Could we doubt that they run for a considerable portion of their lines practically parallel to each other, and that they

must necessarily compete for the traffic lying between them? We think we must take judicial notice that these two roads are parallel and competing lines. And this is sufficient, so far as the disposition of this case is concerned.

"We are of the opinion that the finding would have been sufficient to support the judgment, if it had been that but two of the defendants were competitors with each other for traffic. The same may be said as to a portion of the lines of the Texas & Pacific Co., and the St. Louis, Arkansas & Texas Co., which extend from Sherman to Texarkana. We cannot shut our eyes to the notorious and indisputable facts that these portions of the respective lines touch at the same points, and that they are natural competitors for the traffic of a large scope of country."

In this case it was held that the court could rightfully take judicial notice of the fact that two railroads and other railroads connected with them touch the same points and are practically parallel and necessarily competing lines. (This was a suit in equity brought by the State through the attorney general to prevent the defendants from carrying out an agreement in which they organized a body of representatives appointed by the companies parties to the agreement, which body had the right to fix rates on freight carried to and from points within the State.)

In Miller *et al. vs.* Texas & N. O. R'y Co., 18 S. W. Rep., 954, it is said:

"There are certain facts, however, which may be judicially noticed by the court, because of their public notoriety and indisputable existence. Railroads are public highways, and it is a matter of history that important lines of railroad, once established, have remained as fixed and permanent in their course as the rivers themselves. Their locality be-

comes so notorious and indisputable that the courts will take notice thereof" (Railway Co. *vs.* State, 72 Tex., 410, S. C., 10 S. W. Rep., 81).

"So the court would take notice of the locality of the defendant's line of railroad, for it is a physical and geographical fact of undisputed notoriety."

In G. H. & S. A. R'y Co. *vs.* Johnson, 29 S. W. Rep., 428, it is held that it is error to charge that the defendant must prove that defendant's railway does not extend beyond a certain place, since the courts take judicial notice of the termini of railroads, and, discussing the matter, it is said, l. c., 430:

"The courts take judicial cognizance of the locality of defendant's railroad (Miller *vs.* R'y Co., 83 Tex., 518; S. C., 18 S. W. Rep., 954).

"This necessarily involves judicial knowledge of where the line terminates."

The court charged the jury that it must be proved by defendant that the line of the Galveston, Harrisburg and San Antonio R'y Co. did not extend beyond Houston. And this charge was held error for the reason already stated.

In Hunt *et al. vs.* Atchison, Topeka and Santa Fe R'y Co., 28 S. W. Rep., 460, it is said:

"This court is authorized to take judicial knowledge of the fact that a line of railroad, notoriously known as that of the Atchison, Topeka & Santa Fe railroad, extends into El Paso county in this State" (Miller *vs.* R'y, 83 Tex., 520; 18 S. W. Rep., 954; Gulf, Colorado and Santa Fe *vs.* State, 72 Tex., 409; 10 S. W. Rep., 81).

In Texas and Pacific R'y Co. *vs.* Black, 27 S. W. Rep., 118, it is held that it is a matter of judicial knowledge that several railroads run into the city of Texarkana, and with respect to this matter the court says, l. c., 120:

"This court knows judicially that there are a number of railroads besides that of defendant running into Texarkana (G. C. & S. F. R'y *vs.* State, 72 Tex., 404; 10 S. W., 81)."

Courts will take judicial notice of the fact that a certain county adjoins another, and that there are facilities for a connection by railroad and telephone between two certain places,

Evans *vs.* Kilby, 81 Ga., 278,

Or that a road running from one terminus to another is located wholly within a certain county.

Stein *vs.* Versailles Turn Pike Co., 57 Ind., 457.

Courts will take judicial notice of the manner in which the great railroads of the country are managed in matters pertaining to the ordinary and usual operation thereof in their intercourse with the public,

Slater *vs.* Jewett, 85 N. Y., 61;

And of the use of telegraph lines in connection with railroads,

State *vs.* Ind., etc., R'y Co., 133 Ind., 69.

Courts will take judicial notice of the comparative length and amount of traffic over different roads,

St. Louis Bridge, etc., R'y Co. *vs.* People, 127 Ill., 627 (39 A. & E. R. R. Cas., 562).

The court will take judicial notice of the ordinary course and usage of business of railroad corporations, for instance, with respect to the usage of carriers in checking through baggage,

Isaacson *vs.* N. Y. & H. R. R. R. Co., 94 N. Y., 278;

Also that trains are operated by telegraph,

Slater *vs.* Jewett, 85 N. Y., 61;

Courts will take judicial notice of the statement and report of commissioners of railroads,

C. & W. B. R'y Co. *vs.* Hoffhines, 46 Ohio St., 643;

Of the distance between the principal cities of the country and the time required for railroad trains to run to and from them,

Clair *vs.* Chicago, B. & Q. R'y Co. (Iowa), 45 S. W. Rep., 470;

Pearce *vs.* Langfit, 101 Pa. St., 507;

Of the facilities for public travel between different points,

Morgan *vs.* Farrell, 58 Conn., 413;

Maghie *vs.* Camden & Amboy R'y Co., 45 N. Y., 574;

Manning *vs.* Gasparie, 27 Ind., 399;

Of the functions of railway officers, like ticket agents and conductors, and that the abbreviation "Supt." stands for word "superintendent,"

South Missouri Land Co. *vs.* Jeffries, 40 Mo., 360;

That the driver of a street car is subject to the conductor's orders,

Seaman *vs.* Koehler, 122 N. Y., 646;

Of the acts of *building* and running railroads in different places,

Wellman *vs.* Chicago & I. R'y Co., 83 Mass., 593;

Of the course of business of railroad companies in transferring cars over more than one line of railroad without breaking bulk,

Burlington R. & N. R'y Co. *vs.* Day, 82 Ia., 312;

The rules and regulations of railroad companies,

Highland Ave. B. R. R. Co. *vs.* Walters (Ala.), 8 South. Rep., 357.

In U. P. R'y Co. *vs.* Richmond & C. R'y Co., 96 Va., 674 (32 Southeast Rep., 788), it is held courts will take judicial notice that maintenance of gates and a flagman at crossings diminishes danger of accidents.

In Louisville & Nashville R'y Co. *vs.* Boland, 18 L. R. A., 260, it is held that judicial notice will be taken, as a matter of common knowledge, that the demands of commerce require the cars of one railroad company to be hauled over other railroads.

"We apprehend that the ordinary speed of railway trains is a matter of judicial cognizance and hence a very simple computation will demonstrate with approximate certainty the time within which mails may be transported between such cities as New York and Pittsburgh."

Pearce *vs.* Langfit, 101 Pa. St., 737.

"The court had judicial knowledge that Ansonia was easily accessible from New York city by railway, and that there was frequent communication by mail, or that the tele-

graph might have been used and a reply obtained in half an hour and at trifling expense. When so many circumstances called for inquiry, and with all these means by which inquiries could have been satisfied, and when none of them were used, we cannot hold that the plaintiff's assignors exercised good faith or due diligence to know the truth."

Morgan *vs.* Farrel, 58 Conn., 413.

"The manner in which railway companies conduct their business has been so long followed, with such a degree of uniformity, that the courts are bound to take judicial notice of these general features.

"Among those may be mentioned the division of their freight and passenger business into two departments, and the separation of their passenger and freight trains. As a general rule, freight is not carried upon passenger trains and passengers are not carried upon freight trains."

Atchison, Topeka & Santa Fe R'y Co. *vs.* Headland, 20 L. R. A., 822; l. c., 825.

In Oren, attorney general, *vs.* Pingree, 46 L. R. A., 407; l. c., 416, it is held that judicial notice, as a matter of common knowledge, will be taken of the fact that over some street car lines large cars are run at frequent intervals carrying freight.

Third.

DOES THE BILL SHOW AN ATTEMPTED OBSTRUCTION OR DESTRUCTION OF INTERSTATE COMMERCE WITH OR WITHOUT THE APPLICATION OF THE DOCTRINE OF JUDICIAL NOTICE, AND IF THE STATE OF ARKANSAS BE THE REAL PARTY IN INTEREST, DOES THE BILL SHOW AN ATTEMPTED DENIAL OF RIGHTS, PRIVILEGES, AND IMMUNITIES GUARANTEED BY THE FOURTEENTH AMENDMENT?

It is said by the court, in delivering the opinion in this case, that "the averments brought no controversy in this regard into court in respect of which resort might be had to judicial notice."

It is submitted that this statement was made without a proper understanding of the boundaries of the western district of Arkansas, and of the twelfth judicial circuit of Arkansas, and of Sebastian county, Arkansas, and of the city of Ft. Smith, and of the location of the St. Louis and San Francisco railroad in said State and judicial circuit, a matter of common knowledge, open, notorious, and indisputable.

The statement which precedes this argument shows clearly and plainly (and which statement was not made in the original brief before, owing to inadvertence of counsel and for the reason that the facts are so open and notorious at Ft. Smith that it was not thought necessary to mention them in detail) that the boundary line between the Choctaw Nation and the Indian Territory is just west of the national cemetery at Ft. Smith, and that the Poteau river, which flows into the Arkansas river opposite Ft. Smith and forms

the southwestern boundary of that portion of the Indian Territory east of the Poteau river and east of the Arkansas river, adjoins Ft. Smith opposite section 17, of township 8, range 32, and this location is mentioned in the act of Congress granting the right of way to the St. Louis and San Francisco railroad through the old military reservation at Ft. Smith.

The St. Louis and San Francisco railroad, after crossing a bridge over the Arkansas river (authorized under the act of Congress of July 3, 1882), runs south to the city limits of Ft. Smith, and then near the wharf along the Arkansas river a little southeast, and then turns to the southwest through the old military reservation, and within a few feet of the national cemetery at Ft. Smith, and then runs south three miles in Arkansas, and enters the Indian Territory, and continues in the Indian Territory for about eight or ten miles, and then enters the State of Arkansas for a short distance, until a point north of the town of Jenson is reached, when, with a sharp southwest turn, the main line of said railroad runs out into the Indian Territory past Jenson station, the main line, track, and platform at said station being located in the Choctaw Nation, and the station-house right on the western line of the State of Arkansas—so close, in fact, that when a passenger leaves the station-house and steps out on the platform he leaves the State of Arkansas and enters the Choctaw Nation, and when he boards or alights from a train standing on the track at said station the train is located in the Indian Territory.

All of these facts are open, notorious, and indisputable at Ft. Smith and throughout the western district of Arkansas, and they are matters of such everyday, common knowledge

that every person in that community is acquainted with them; and, in addition, every fact to which attention has been called is proven by an act of Congress or by an act of the legislature of Arkansas or by some treaty entered into between the United States and some one of the Indian tribes.

The circuit court certainly had the right to take judicial notice of the fact that the St. Louis and San Francisco railroad was constructed through the old military reservation at Ft. Smith and near the national cemetery, as authorized by act of Congress, and that at a point immediately south of section 17, township 8, range 32 (about three miles), said railroad leaves Sebastian county and leaves the western district of Arkansas and enters the Indian Territory; and this is a matter open, notorious, and indisputable. Said railroad is a post-route and a great public highway leading from St. Louis, Missouri, to Paris, Texas, as shown in the various acts of Congress which have been called to the court's attention.

The circuit court also have the right to take judicial notice of the fact that the town of Jenson was located on the western border of the State of Arkansas, in Sebastian county, and that the location of said railroad was such with respect to Jenson station that no person could travel from the north or the south over said railroad into said station without being carried through a portion of the Indian Territory.

The allegations of the bill show clearly that the St. Louis and San Francisco railroad enters the twelfth judicial circuit, because an attempt is made to enjoin the transportation of a certain class of men by said railroad into said

circuit and into Sebastian county, and especially Huntington, in said county, and the men whose transportation the bill was filed to prevent were certainly located outside of the twelfth judicial circuit, else the complainant would not seek to enjoin their transportation thereto; and said railroad had lines of railroad outside of said judicial circuit, otherwise it would have been impossible for it to transport such men into said circuit, and the circuit court had the right to take judicial notice of the act of the legislature of Arkansas, which determined the limits of the twelfth judicial circuit and the counties contained therein, to wit, Sebastian and Scott, and their location with respect to each other and their location with respect to the western boundary of Arkansas and the eastern boundary of the Choctaw Nation; and the circuit court had the right to take judicial notice of the course of the Arkansas river and of the course of the Poteau river and of the location of these rivers with respect to each other and with respect to the city of Ft. Smith; and it had the right to take judicial notice of the location of the city of Ft. Smith, of the old military reservation and of the national cemetery in Ft. Smith (both established by acts of Congress) and of the acts of Congress which gave said railroad the right to extend its line through the old military reservation and of the distance from the Federal building at Ft. Smith to the national cemetery and to the military reservation and the southern boundary of Ft. Smith and to the point where the southern boundary line of Ft. Smith and the western boundary line of Sebastian county and of the State of Arkansas met and joined the eastern boundary line of the Choctaw Nation.

All of these facts of which the court had the right to take

judicial notice, and which were open, notorious, and indisputable within the limits of the western district of Arkansas, and of which the State courts of Arkansas take judicial notice, not only at common law, but under the provisions of their statute (to which reference has been made), knew all of these facts as a part of the bill of complaint, and to the same extent as if all of said boundary lines had been mentioned expressly in the bill of complaint and the location of the line of the St. Louis and San Francisco railroad had been described at length therein.

All of these things being true, the circuit court knew, as a fact and as a matter of judicial knowledge, that it was impossible for the St. Louis and San Francisco railroad to be enjoined from bringing men of a certain class into the limits of the twelfth judicial circuit from points outside thereof and into Huntington, Sebastian county, Arkansas, or into said circuit, without bringing them from the south or from the north of the town of Jenson, and the circuit court knew that if such men were transported over said railroad through Ft. Smith from points north of Sebastian county or from Ft. Smith that they would be carried through eight or ten miles of the Indian Territory to reach the town of Jenson, and would alight from the train in the Indian Territory and walk across the station platform and enter the State of Arkansas in the station-house, and the circuit court knew that if they were brought from the south they would come entirely through the Indian Territory after leaving the northern boundary of the State of Texas.

It seems, it is respectfully submitted, impossible, under these circumstances, to resist the conclusion that the bill of complaint upon its face did show that the State of Arkansas,

if the real party in interest, was attempting by this proceeding in equity not only to obstruct and interfere with interstate commerce, but actually to destroy it so far as it was being performed by this great public highway, the St. Louis and San Francisco railroad, and certainly, that being true, a Federal question did arise upon the face of the bill of complaint and, by virtue of plaintiff's statement of his own claim, whether the State of Arkansas had the right in any court, under the interstate-commerce clause of the United States Constitution and under the provisions of the fourteenth amendment, to do the things which the State of Arkansas sought to do under this bill of complaint.

And this statement applies to an attempted regulation of interstate commerce (a matter exclusively committed to Congress), and it would apply to the denial of rights, privileges, and immunities to certain citizens of the United States which were granted to other citizens of the State of Arkansas, even assuming that this court is correct in considering the bill to be limited in its application to citizens of Arkansas.

And it is submitted that the State of Arkansas in this proceeding is asserting the right to do by injunction, in the absence of any law announcing the public policy of the State, what could not be done by law under the Constitution of the United States, because any such law would be an attempted regulation of interstate commerce (something left exclusively to Congress), and this proposition is announced clearly and unequivocally in the case of Hannibal & St. Joe Railroad *vs.* Husen, 95 U. S., 469.

The fact that the State of Arkansas has no duty to perform in protecting interstate commerce (176 U. S., 19) does

not prevent the State from obstructing and interfering with interstate commerce, and the necessary effect of the thing sought to be done under this bill of complaint is an interference with interstate commerce.

The doctrine of judicial notice in this case is only necessary for the purpose of locating the boundaries of the western district of Arkansas, the boundaries of the twelfth judicial circuit, the boundaries of Sebastian and Scott counties, and the boundaries of the city of Ft. Scott, and of the western boundary of the State of Arkansas and of the eastern boundary of the Choctaw Nation, and all of these things are not only open, notorious, and indisputable in the western district of Arkansas, but they are all fixed by positive law, to wit, by treaties with the Indian tribes, by acts of Congress, and by acts of the legislature of the State of Arkansas. And the location of the St. Louis and San Francisco railroad is definitely fixed by an act of Congress through the military reservation in the city limits of Ft. Smith, and this court knows, as a matter of judicial knowledge, that the St. Louis and San Francisco railroad could not have been constructed south of Ft. Smith through the Indian Territory except under authority of an act of Congress.

This proposition is amply supported by the case of Spokane Falls and Northern Railroad Co. *vs.* Ziegler (167 U. S., 65; l. c., 72), where it was held that the authority of a certain Territory to legislate with respect to a right of way for a railroad therein to enter upon public lands was derived from a certain act of Congress—in other words, without the act of Congress that the Territory would have had no right to pass any such law.

And so here the St. Louis and San Francisco railroad had

no right to enter the Choctaw Nation, except under authority of an act of Congress, and had no right to enter the nation at any place except as authorized thereby.

This court, in the case of Reagan *vs.* Farmers' Loan & Trust Co. (154 U. S.), held that the circuit court and the supreme court had the right to take judicial notice of the fact that Austin was the county-seat of Travis county, and that Travis county was one of the counties included within the western district of Texas.

The State of Arkansas, in its bill of complaint in this case, asserts the right to prevent the doing of all of the things which it asks to be enjoined. In other words, it asserts the right to prevent the entrance into the State of Arkansas of a certain class of men and their transportation into the twelfth judicial circuit over a certain railroad.

And if, as a matter of fact, that transportation is interstate transportation, then the State of Arkansas is seeking to obstruct and interfere with interstate commerce—a matter exclusively committed to the regulation of Congress; and it does not make any difference whether the State of Arkansas seeks to do this under the Constitution of the United States or by virtue of any other authority or power.

If the State of Arkansas is endeavoring to accomplish a certain thing which the Constitution of the United States prohibits, then the construction of the Constitution is a necessity in order to determine the judgment to be given with respect to the prayer of the bill.

In the great case of Gibbons *vs.* Ogden (9 Wheat., 1), it is said:

"But on all matters that are the subject of commerce within the meaning of the commerce clause of the Federal

Constitution, State regulations must be limited to subjects of police power *and must not themselves be the regulation of commerce.*"

It is respectfully submitted that this court will not announce the proposition that the bill of complaint or declaration does not show a question arising under the Constitution and laws of the United States, except when the pleader, in so many words, asserts therein that the cause of action itself arises as a matter of fact under the Constitution and laws of the United States.

In other words, if the bill or declaration, by a process of legal deduction from the allegations thereof, does show that the relief prayed for cannot be granted without a construction of the Constitution and laws of the United States, then a Federal question does arise upon the face of the bill or declaration, and is shown by the plaintiff's statement of his own claim.

And, further, this is especially true where it can be seen by judicial inspection of the allegations of the bill or declaration that the case stated cannot be determined except as a result, and after a construction of some provision of the Constitution or of some law of the United States. In other words, judgment cannot be given under the allegations of the bill or declaration without calling in question or giving construction to some provision of the Constitution of the United States or some law or treaty thereof.

This question, it is submitted, does not concern the other question whether the bill or declaration alleges facts sufficient to state a cause of action at law or in equity, or whether the complainant or plaintiff will ultimately obtain the relief which he seeks under the allegations of the bill

or declaration, because that is a question upon the merits of the case; and the only question which arises in the circuit court on motion to remand, or which arises in this court when this court seeks to determine whether the circuit court had jurisdiction, is whether the plaintiff's statement of his own claim (that is to say, whether the allegations of the bill or declaration and the legal deductions and conclusions which must be drawn therefrom) do show that some provision of the Constitution of the United States will be called into question or will have to be construed to determine the ultimate question of law whether the plaintiff or complainant under the bill or declaration can have the relief prayed for.

And when it is seen that some provision of the Constitution will be called into question, or some provision of some law of the United States will have to be construed one way or the order in order to support or defeat the case made in the bill or declaration, then a Federal question does arise upon the face of the complaint and is made by plaintiff's statement of his own claim; and this is also true when the allegations of the bill or declaration are such that the legal mind must conclude that the Constitution of the United States bars the way to the relief sought.

It will hardly be contended that the legal effect, application, and operation of the allegations of the bill or declaration are no longer the subject of legal examination, and it will hardly be contended that in order to ascertain whether a Federal question arises upon the face of the bill or declaration that we are limited entirely to the allegations of the bill or declaration and cannot determine the legal effect, application, and operation of those allegations under the Con-

stitution and laws of the United States in connection with the prayer for relief.

Nor can it be said that, to give the circuit court jurisdiction of a Federal question, the plaintiff must allege all facts which are matters of common knowledge and open, notorious, and indisputable in the community in which the circuit court sits; and especially is this true where the statute of the State expressly provides, both in criminal and civil cases, that neither presumptions of law nor matters of judicial knowledge need be stated in any indictment or pleading.

So that the circuit court at Ft. Smith had the right to take judicial knowledge of every fact of which the State courts of Arkansas would have taken judicial notice, and a reference to the decisions of the Arkansas supreme court shows their broad construction of the statute with respect to judicial notice.

It is only by legal deductions and conclusions from the allegations of the bill or declaration and from the facts stated therein, coupled with judicial knowledge of the physical facts, boundary lines, etc., of the district covered by the allegation of the bill or declaration, and applying thereto legal principles, that the court is enabled to determine whether any provision of the Constitution of the United States will be called in question and whether any construction of the Constitution or laws of the United States will be necessary in order to determine the case presented.

The bill in the case of Tennessee *vs.* Bank (152 U. S., —) was filed in the circuit court, and the allegation is made therein that defendant would claim that the act under which the taxes sued for were levied was void as an impairment

of the obligation of contract, and it was said in that case that such an allegation would have been stricken out, on motion, as surplusage, and this statement simply means that for the purpose of invoking the jurisdiction of the circuit court upon the sole ground that there is a controversy arising under the Constitution and laws of the United States (which must be made to appear on the face of the bill) that what defendant will claim or contend in making his defense to the bill or declaration makes no difference whatever, for plaintiff's case must be complete in itself, and plaintiff's bill must show a state of facts which entitles the circuit court in the first instance to take cognizance of the particular case; and in this cause the State of Arkansas was or was not the real party in interest, and upon that issue the question turns—that is to say, if the State be the real party in interest, then one Federal question arises, because the action is founded upon a provision of the Constitution and authorized thereby; otherwise there is diversity of citizenship and we need not look for a Federal question, though several would remain and be shown, it is submitted, upon the face of the bill of complaint.

To put the matter another way: In Tennessee *vs.* Bank, the State, as plaintiff, was trying to stay in the Federal court in a suit against one of its own citizens by alleging in its declaration that defendant would claim a second legislative act was an impairment of contract obligation under a former act, and defendant might never make any such claim, and without a statement of what defendant would claim plaintiff hoped for no standing in the Federal court and had none with it. Here, on the contrary, if the State be two real party in interest we meet the test for removal, for the citizens of

another State are defendants, and we meet the same test if the State be not the real party in interest, for there we have diversity of citizenship, and with or without diversity of citizenship we have several Federal questions, *i. e.*, whether the State or the people of one of its judicial circuits (or prosecuting attorney) can have the relief prayed for under the Constitution of the United States, and this determines the removability of the cause at the time the petition therefor was filed, *irrespective of the fact that judgment after removal must go in favor of defendants upon the facts pleaded.*

St. Louis & San Francisco Railroad Co. *vs.* McBride, 141 U. S., 127;
Marshall *vs.* Holmes, 147 U. S., 589;
Schunk *vs.* Moline, etc., Co., 147 U. S., 500;
Pacific Express Co. *vs.* Seibert, 140 U. S., 692.

The point that the necessary effect of the bill is an attempt to regulate interstate commerce is elaborated in the fifth, seventh, and eighth subdivisions of the petition for rehearing.

It may perhaps be said without fear of contradiction that the State of Arkansas would be interested in enjoining the transportation of men of the class objected to into any part of the State rather than into the twelfth judicial circuit alone (assuming that they could not be the source of contagious and infectious diseases, for the bill does not allege they have any such) unless they were so afflicted.

The circuit court found that interstate commerce would be obstructed and impeded, and its opinion in the record so shows, and of its contents this court will take judicial notice (Loeb *vs.* Columbia Township Trustees, 179 U. S., 472;

l. c., 483); and this finding was based upon considerations such as are set forth in the fifth, seventh, and eighth subdivisions of the petition for rehearing, but more especially based upon the fact that the court knew judicially and personally that no person could be transported over the St. Louis and San Francisco road into Huntington from points north or south of Jenson without being carried through the Indian Territory and Jenson.

It is earnestly insisted that the petition for rehearing should be granted and the judgment of the circuit court affirmed, after oral argument, if deemed necessary by this honorable court.

If the test of removability is to be determined, therefore, by the question of whether the plaintiff or complainant in a particular case should have invoked the jurisdiction of the circuit court in the first instance, then it is submitted, and with confidence, that this case was certainly removable into the circuit court.

All of which is respectfully submitted.

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